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No.

OCTOBER TERM, 1986

**IN THE SUPREME COURT OF THE UNITED STATES**

EDWARD BUNDRICK, RUBY BUNDRICK and YZOBEL BUNDRICK,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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## QUESTIONS PRESENTED*

1. Is the rule regarding the accrual of a cause of action as set forth in this Court in U.S. v. Dickinson still valid?

2. Does a cause of action for inverse condemnation accrue on the taking of a non-compensable property interest as held by the Court of Appeals?

3. Is the statute of limitations tolled during the time when Petitioners were waiting for a determination of fair value for their Fifth Amendment property rights?

4. May the Government reap the benefit of affirmative misconduct by claiming that what the Government declared as true in 1969 was not in fact true, according to the Court of Appeals?

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*All parties to the instant case are listed in the caption of the Petition. Pursuant to Supreme Court Rule 21.1(6). *Alder v. U.S.* was consolidated at trial, and consolidated for oral argument by the Court of Appeals. Counsel expect to file a Petition for Writ of Certiorari within a week of this Petition in the matter of *Alder v. U.S.*

## TABLE OF CONTENTS
(Page One)

---


| | Page |
|---|---|
| Questions Presented | 1 |
| Parties to the Proceedings Below | 1 |
| Table of Contents | One |
| Table of Authorities | i |
| Opinions of the Courts Below | 2 |
| Jurisdiction | 2 |
| Constitutional and Statutory Provisions | following page 2 |
| Statement of the Case and Material Facts | 3 |
| Reasons and Argument for Granting the Petition | 7 |
| I. The Court of Appeals' Decision Is Contrary To This Court's Decision In U.S. v. Dickinson and Established Precedent of 40 Years | 7 |
| II. The Court Of Appeals' Decision Commences The Running Of The Statute Of Limitations Before A Compensable Event Has Occurred And Is Contrary to U.S. v. Fuller, 409 U.S. 488 (1973) | 17 |
| A. The Statute Of Limitations Cannot Begin To Run On The Taking Of A Non-Compensable Interest In Real Estate | 17 |

## TABLE OF CONTENTS
(Page Two)


Page

B. The Court Of Appeals' Decision That Petitioners' Easement Of Ingress And Egress Were Taken By The 1969 Order Of Restoration Is Contrary To The Language Of The Order . . . . . 23

C. Petitioners Had No Compensable Interest Which Was Taken Until The Passage Of Public Law 93-350 Effective December, 1974 . . . . 25

1. Improvements On Taylor Grazing Land 25

2. Base Ranch Fee Lands . . . . 27

3. State Lease Lands . . . . 28

III. The Court Of Appeals' Decision Holding That 1969 Is The Date Of Value Of Petitioners' Property Interests Pursuant To Public Law 93-350 Amounts To An Unconstitutional Deprivation Of Just Compensation And Is Clearly Erroneous . . . . . 29

IV. The Court of Appeals Decision Requires Judicial Resolution of A Case Without Controversy and A Case Which Was Not Ripe for Resolution . . . . . 33

## TABLE OF CONTENTS

(Page Three)

---


| | | Page |
|---|---|---|
| V. | The Government Is Estopped From Asserting The Alleged Lack Of Access As The Cause Of Accrual Of Petitioners' Action . . . . . | 40 |
| Conclusion | . . . . . | 43 |
| Appendix . . | . . following page | 43 |

## TABLE OF AUTHORITIES


| STATUTES, RULES AND CONSTITUTIONS | Page |
|---|---|
| Taylor Grazing Act, 48 Stat. 1270 as amended 43 U.S.C. §315(b). . . . . | .[15] |
| 3, 4, 5, 19, 20, | |
| 22, 25, 27, 28 | |
| Public Law 93-530, 88 Stat. 1711 . . . . . | .[13] |
| 5, 6, 14, 25, 26, | |
| 27, 29, 30, 31, 33, | |
| 34, 35, 36, 37 | |
| 28 U.S.C. §2501 . . . . . | .[17] |
| 7, 12, 19, 24 | |
| Arizona Revised Statutes §12-526 . . . [18] . 11 | |
| United States Constitution, Fifth Amendment . . 1, 5, 6, 9, | |
| 23, 24, 28, 29, 30 | |
| . . . . 38 | |
| Act of Congress, Sess. I, Ch. 398, 1986 . . . . [1] | |
| Dept. of Interior, Office of the Secretary Order No. 2874, June 17, 1963 . [9], 4, 32 | |
| Dept. of Interior, Office of the Secretary Order for Restoration of Surface Rights, In Certain Lands, January 16, 1969. . [11] 4, 5, | |
| . 13, 14, 20, 21, | |
| . 32, 34, 37, 39 | |

CASES — Page

Aaron v. United States,
311 F.2d 655, 167 Ct.Cl. 818 (1964) . . . 18

Aetna Life Insurance Co. v. Haworth,
300 U.S. 227, 57 S.Ct. 461, 81 L.Ed.2d 617,
reh'g denied, 300 U.S. 687, 57 S.Ct. 667,
81 L.Ed.2d 887 . . . . . 38

Almota Farmers Elevator & Warehouse Co.
v. United States,
409 U.S. 470, 93 S.Ct. 791,
35 L.Ed.2d 1 (1973) . . . . . 33

Avery v. United States,
311 F.2D 798, 167 Ct.Cl. 818 (1964) . . . 18

Bruno v. United States,
556 F.2d 1104 (Ct.Cl. 1977) . . . . . 38

Castro v. United States,
500 F.2d 436 (Ct.Cl. 1974) . . . . . 38

Davis v. Mills,
194 U.S. 451, 24 S.Ct. 695,
48 L.Ed. 1067 (1904) . . . 7, 9, . 10

**CASES (Continued)** **Page**

Dzialo v. United States,
677 F.2d 873 (Ct.Cl. 1982) . . . 38, . 39

Friedman v. United States,
310 F.2d 381 (Ct.Cl. 1963) . . 35, 38 . 39

Garcia v. United States,
617 F.2d 218 (Ct.Cl. 1980) . . . . . 38

Gerber v. United States,
2 Ct.Cl. 311 (1983) . . . . . 39

Hanson v. Harris,
619 F.2d 942 (2d Cir. 1980)
reviewed per curiam,
450 U.S. 785, 101 S.Ct. 1468,
67 L.Ed.2d 685 (1981) . . . . . 41

John v. Sikes,
730 F.2d 644 (11th Cir. 1984). . . . . 38

Johnson v. Williford,
682 F.2d 868 (9th Cir. 1982) . . . 41, . 42

Klein v. United Sates,
152 Ct.Cl. 221 (1961) . . . . . 41

**CASES (Continued)** **Page**

Moser v. United States,
341 U.S. 41, 82 S.Ct. 553,
95 L.Ed 729 (1951) . . . . . 41

Northern Life Insurance v. United States,
685 F.2d 277 (9th Cir. 1982) . . . . . 41

Olson v. United States,
292 U.S. 246, 54 S.Ct. 704,
78 L.Ed 1236 (1934) . . . . . 33

Oro Fino Consolidated Mines, Inc.,
v. United States,
92 F.Supp. 1016, 118 Ct.Cl. 18 (1950),
cert denied, 341 U.S. 948,
71 S.Ct. 1015, 95 L.Ed 1371 (1951) . . . 18

Schweiker v. Hansen,
450 U.S. 785, 101 S.Ct. 1468,
67 L.Ed.2d 685 (1981) . . . . 40, 41

Silverberg v. United States,
155 Ct.Cl. 436 (1961) . . . . . 17

Terteling v. United States,
334 F.2d 250, 167 Ct.Cl. 331 (1964) . . . 18

**CASES (Continued)** **Page**

United States v. Cors,
337 U.S. 325, 695 S.Ct.1086,
93 L.Ed. 1392 (1949), . . . . . 43

United States v. Dickinson,
331 U.S. 745, 67 S.Ct. 1382,
91 L.Ed. 1789 (1947) . . 7, 9, 10, 11
12, 13, 15, 16, 17, 18

United States v. Fuller,
409 U.S. 488, 93 S.Ct.801,
35 L.Ed.2d 16 (1973) . . 20, 21, 22, 23
. . 24, 25, 27, 28

United States v. Memphis Cotton Oil Co.,
288 U.S. 62, 53 S.Ct. 278,
77 L.Ed. 619 (1933) . . . . . 10

United States v. Miller,
317 U.S. 369, 63 S.Ct. 276,
87 L.Ed. 336 (1943), reh denied,
318 U.S. 798, 63 S.Ct. 557,
87 L.Ed.2d 1162 (1943) . . . . . 33

United States v. Rands,
389 U.S. 121, 88 S.Ct. 265,
19 L.Ed.2d 329 (1967) . . . . . 43

**CASES (Continued)** **Page**

United States v. Taylor,
104 U.S. 216, 26 L.Ed 721 (1881) . . . . 36

United States v. Twin City Power Co.,
350 U.S. 222, 76 S.Ct. 259,
100 L.Ed. 240, reh denied,
350 U.S. 1009, 765 S.Ct. 698,
100 L.Ed. 871 (1956) . . . . . 43

United States v. Vuitch,
402 U.S. 62, 91 S.Ct. 1294,
28 L.Ed.2d 601 (1971) . . . . . 30

Western Mining Council v. Watt,
643 F.2d 618 (9th Cir. 1981) . . . . . 38

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

2. Act of Congress Sess. I Ch. 398, 1896, Agreement With The Indians of the San Carlos Indian Reservation in Arizona

AGREEMENT WITH THE INDIANS OF THE SAN CARLOS INDIAN RESERVATION IN ARIZONA.

Agreement with San Carlos Reservation Indians.

SEC. 10. Whereas Province McCormick, United States Indian inspector, did, on the twenty-fifth day of February, eighteen hundred and ninety-six, in

accordance with the provisions of the Act of Congress of March second, eighteen hundred and ninety-five (Twenty-eighth Statutes at Large, page eight hundred and ninety-four), conclude an agreement with the Indians of the San Carlos Reservation, Arizona, for the cession and relinquishment to the United States of lands of the reservation embracing the coal fields, which said agreement is in words and figures as follows (House Document Numbered Three hundred and twenty, Fifty-fourth Congress, first session), to wit:

This agreement, made on the twenty-fifth day of February, one thousand eight hundred and ninety-six, pursuant to an item in the Act of Congress making appropriations for current and contingent expenses and fulfilling treaty stipulations with Indian tibes for the fiscal year ending June 30, 1896, as follows: "The Secretary of the Interior is authorized to negotiate with the Indians on the San Carlos Reservation, Arizona, through an inspector, for the cession or relinquishment to the United States of the lands embracing the coal fields, and that any agreement made shall be submitted to Congress for its action," by Province McCormick, United States Indian inspector, on the part of the United States, and the Apache, Mohave, and Yuma Indians, residing on the San Carlos Indian Reservation, in the Territory of Arizona, by their chiefs, headmen, and members of said tribes, embracing a majority of all the male adult indians occupying said reservation, witnesseth:

## ARTICLE I.

Lands ceded.

That the said Indians do hereby cede, grant, and relinquish to the United States all right, title, and claim which they may have in and to all the land embraced within the following-described tract, now a part of the said San Carlos or White Mountain Indian Reservation, to wit:

All the land lying south of a line, commencing at a point on the present eastern boundary of the said reservation, one mile south of Goodwin Spring; thence in a general direction west to the highest point on Mount Turnbull; thence in a westerly direction to a point on a line between the agency building proper and Stanley, or the Saddle butte, seven miles from said building in a southerly direction; thence in a western direction at longest possible tangents to the mouth of Hawk Canyon, not crossing said canyon; thence down the Gila River, following the south bank to a point where said Gila River crosses the present western boundary of the reservation.

## ARTICLE II.

Consideration.

That in consideration of the lands ceded, relinquished, and conveyed, as aforesaid, the United States stipulates and agrees to place in the Treasury of the United States to the credit and for the sole benefit of the said Apache, Mohave, and Yuma Indians and to account therefor annually, to them through their agent, the net proceeds accruing from the disposal of such coal and mineral lands, lying

within the ceded territory, under the laws applicable thereto; and that said money shall be paid to them in cash from time to time as the same shall become available, pro rata, share and share alike, to each man, woman, and child of the tribes now living upon and entitled to the privileges of the said reservation:

Prior claims barred.

Provided, That none of the money credited to said Indians under this agreement shall be subject to the payment of any claims, judgments, or demands against said Indians for damages of depredations, claimed to have been committed prior to the signing of this agreement.

ARTICLE III.

Survey, etc.

That for the purpose of segregating the ceded land from the diminished reservation the new boundary line described in article one of the agreement shall be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments; and that the cost of said survey shall be chargeable to and be paid out of the proceeds of said ceded lands.

ARTICLE IV.

Ratification.

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

Dated and signed at San Carlos Agency, Arizona, on the twenty-fifth day of February, one thousand

eight hundred and ninety-six.

PROVINCE McCORMICK,
United States Indian Inspector.

The foregoing articles of agreement having been fully explained to us in open council, we, the undersigned chiefs, headmen, and members of the several bands of Apache, Mohave, and Yuma Indians, attached to and receiving rations at the San Carlos Agency, in the Territory of Arizona, do hereby consent and agree to all the stipulations therein contained.

Witness our hands and seals at San Carlos Agency, Arizona, this twenty-fifth day of February, one thousand eight hundred and ninetysix.

(Here follows six hundred and three signatures of the adult male Indians of the San Carlos Reservation.)

Witness:
ALBERT L. MYER,
Capt. Eleventh Infantry,
Acting Indian Agent.

D. G. CHEESMAN,
Agency Clerk.

We hereby certify that the foregoing articles of agreement were carefully read and explained to the Indians, parties hereto, in open council, and were throughly understood by them before signing the same, and that the agreement was executed and signed

by said Indians at the San Carlos Indian Agency, in Arizona Territory, on the twentyfifth day of February, one thousand eight hundred and ninety-six.

JAMES STEVENS,
United States Special
Interpreter.

CONSTANT BREAD,
United States Agency Interpreter,
Apache.

MIKE BURNS,
United States Special
Interpreter.

ARTHUR DUCAT,
United States Agency Interpreter,
Mohave.

Witness:
ALBERT L. MYER,
Capt. Eleventh Infantry,
Acting Indian Agent.

D. G. CHEESMAN,
Agency Clerk.

I certify that the records of this office show that the total number of males on this reservation over eighteen years of age, according to last census, was eleven hundred and thirteen, of whom thirty are scouts in the United States service and permanently absent, leaving ten hundred and eighty-three.

ALBERT L. MYER,
Captain Eleventh Infantry,
Acting Indian Agent.

SAN CARLOS AGENCY, ARIZ.,
February 25, 1896.

I certify that the records of this office show ten hundred and eighty-three male adult Indians over eighteen years of age now residing on this entire reservation, and that the foregoing agreement has been duly signed by a majority thereof.

PROVINCE McCORMICK,
United States Indian Inspector.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same is, accepted, ratified, and confirmed.

The Secretary of the Interior shall cause the said boundary line (estimated length forty-five miles), as described in article three of the agreement quoted and made a part of this Act, to be surveyed, marked, and established, by permanent and durable monuments of stone, the same to be set at each mile and half-mile point and at the angles formed on said line, and set, marked, and witnessed in conformity with instructions to be furnished by said Secretary of the Interior relating thereto; the compensation to be allowed for executing said survey not to exceed the sum of forty dollars per mile,

including monuments.

There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one thousand eight hundred dollars, or so much thereof as may be necessary, to carry into effect the provisions of the preceding section, said amount to be immediately available: Provided, however, That from the proceeds of the sale of the lands ceded by said agreement there shall first be deducted an amount sufficient to reimburse the United States for the expenditure authorized by this section.

That upon the filing in the United States local land office for the district in which the lands surrendered by article one of the foregoing agreement are situated, of the approved plat or survey authorized by this section, the lands so surrendered shall be open to occupation, location, and purchase under the provisions of the mineral-land laws only, subject to the several articles of the foregoing agreement: Provided, That the terms of this section shall not be construed to authorize occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey: Provided, however, that any person who in good faith prior to the passage of this Act had discovered and opened, or located, a mine of coal or other mineral, shall have a preference right of purchase for ninety days from and after the official filing in the local land office of the approved plat of survey provided for by this section.

That the Secretary of the Interior is hereby directed to issue a patent in fee to Benjamin J. Clardy for all the land heretofore allotted to him in the Territory of Oklahoma, as a citizen Potta-

watomie Indian, and all restrictions as to the sale, incumbrance, or taxation of said land is hereby removed.

Approved, June 10, 1896.

3. Department of the Interior, Office of the Secretary, Order No. 2874 San Carlos Indian Reservation, Arizona.

DEPARTMENT OF THE INTERIOR
Office of the Secretary
[Order No. 2874]
SAN CARLOS INDIAN RESERVATION, ARIZONA

Order for Restoration of Mineral, Oil and Gas Resources in Certain Lands
June 17, 1963

Whereas, pursuant to the provisions of the Act of June 10, 1896 (29 Stat. 321, 260), the lands described in the Agreement With The Indians of the San Carlos Indian Reservation in Arizona dated February 25, 1896 (29 Stat. 358), commonly known as the San Carlos Mineral Strip and comprising approximately 232,320 acres, were opened to occupation, location and purchase under the provisions of the natural land laws of the United States with the net proceeds from such disposal to be deposited to the credit of the San Carlos Apache Tribe, and

Whereas, there are now remaining undisposed of within this area subsurface interests which may be valuable to the Indians of said reservation, and

Whereas, the San Carlos Tribal Council has petitioned the Secretary to restore to tribal owner-

ship all such undisposed of subsurface interests. and the Suprintendent of the San Carlos Indian Agency and the Commissioner of Indian Affairs have recommended that the petition be granted. and

Whereas, a public hearing on the application of the San Carlos Indian Tribe for a restoration of the land in the San Carlos Mineral Strip was held in Globe, Arizona, February 10-12, 1960 and the transcript of this hearing and evidence submitted therein have been duly considered;

SECTION 1. Now, Therefore, by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the act of June 18, 1934 (48 Stat. 984), I hereby find that restoration to the San Carlos Apache Indian Tribe of the mineral, oil and gas resurces in all of the following described lands will be in the public interest, and the right. title and interest in and to all minerals, oil and gas resources in said lands are hereby restored to tribal ownership for the use and benefit of the San Carlos Apache Tribe of Indians, and are added to and made a part of the existing reservation, subject to any valid existing rights:

All those lands within the area comprising the aforemented San Carlos Mineral Srip as described in Article 1 of the aforementioned agreement dated February 25, 1896 and ratified by the act of June 10, 1896 (29 Stat . 321, 359), and as shown on the plats on file in the Bureau of Land Management.

This order shall not apply to any patented lands or any interest in any patented lands including subsurface interests in such lands) located within the Mineral strip.

Sec. 2. This order shall become effective

immediately upon the adoption by the San Carlos Apache Tribe of a resolution providing that operations under any lease of or permits to the mineral, oil or gas resources in the lands within the Coronado National Forest shall be subject to such administrative supervision by the Secretary of Agriculture as is reasonably necessary to prevent serious injury to the surface resources of the land in the Coronado National Forest, to the extent that such supervision does not prohibit the use of the surface, under accepted engineering or mining standards, for installation of mining equipment or machinery, building and maintaining roadways, free ingress and egress for mining and removal of subsurface resources to market, and the mining and removal of subsurface resources, including the sinking of shafts, driving tunnels or other standard mining methods, except that strip or hydraulic mining shall be permitted only if, and under conditions, approved by the Secretary of Agriculture: Provided, That such resolution is adopted within three (3) months after the date of publication of this order in the Federal Register.

James K. Carr,
Under Secretary of the Interior

[F.R. Doc. 63-6547; Filed June 20, 1963; 8:54 a.m.]

4. Department of the Interior, Office of the Secretary Order for Restoration of Surface Rights in Certain Lands, Dated January 16, 1969. Federal Register Doc. 69-946.

## SAN CARLOS INDIAN RESERVATION, ARIZ.
### Order for Restoration of Surface Rights to Certain Lands

Whereas pursuant to the provisions of the Act of June 10, 1896 (29 Stat. 321, 360), the lands described in the Agreement with the Indians of the San Carlos Indian Reservation in Arizona dated February 25, 1896 (29 Stat. 358), commonly known as the San Carlos mineral strip and comprising approximately 232,320 acres, were opened to occupation, location and purchase under the provisions of the mineral land laws of the United States with the net proceeds from such disposal to be deposited to the credit of the San Carlos Apache Tribe, and,

Whereas, there are now remaining undisposed of within this area surface interests which may be valuable to the Indians of said reservation, and,

Whereas, the San Carlos Tribal Council has petitioned the Secretary to restore to tribal ownership all such undisposed-of surface rights and interests in and to said lands, which the Area Director of the Phoenix Area Office and the Commissioner of Indian Affairs have recommended be granted,

Now, therefore, by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the Act of June 10, 1934 (40 Stat. 984; 25 U.S.C. 463,467), I hereby find that restoration to the San Carlos Apache Indian Tribe of the surface rights in the following described lands will be in the public interest, and the right, title and interest in and to said surface rights in said lands are hereby restored to tribal ownership for the use

and benefit of the San Carlos Apache Tribe of Indians, and are added to and made a part of the existing reservation, subject to any valid existing rights:

The surface rights in those lands within the area comprising the aforesaid San Carlos mineral strip as described in Article I of the aforementioned agreement dated February 25, 1896, and ratified by the Act of June 10, 1896 (29 Stat. 321, 358), and as shown on the plats on file in the Bureau of Land Management.

This order shall not apply to any patented lands or any interest in any patented lands located within the mineral strip.

STEWART L. UDALL
Secretary of the Interior

January 16, 1969.

[F.R. Doc. 69-946: Filed, Jan. 23, 1969, 8:49 a.m.]

5. Public Law 93-530, 88 Stat. 1711 December 22, 1974.

PUBLIC LAW 93-530
AN ACT

To authorize the Secretary of the Interior to purchase property located within the San Carlos Mineral Strip.

Be it enacted by the Senate and House of Representatives of the United States of America in Con-

gress assembled, That the Secretary of the Interior (hereinafter referred to as the "Secretary") is hereby authorized and directed to acquire through purchase within the so-called San Carlos Mineral Strip as of January 24, 1969, all privately owned real property, taking title thereto in the name of the United States in trust for the San Carlos Apache Indian Tribe.

SEC. 2. The Secretary is authorized and directed to purchase from the owners all range improvements of a permanent nature placed, under the authority of a permit from or agreement with the United States, on the lands restored to the San Carlos Apache Indian Tribe for the reasonable value of such improvements, as determined by the Secretary: Provided, however, That, if any such range improvements were constructed under cooperative agreement with the Federal Government, the reasonable value shall be decreased proportionately by the percentage of original Federal participation. Such permanent improvements shall include, but not be limited to, wells, windmills, water tanks, ponds, dams, roads, fences, corrals and buildings. The Secretary shall take title to such range improvements in the name of the United States in trust for the San Carlos Apache Indian Tribe.

SEC. 3. There are authorized to be appropriated for the purpose of this Act not to exceed $3,000,000 to be available without fiscal year limitation: Provided, That in no event shall any person receive total compensation under this Act in excess of $300,000: Provided further, That the Secretary shall make a fair determination of compensation for property acquired pursuant to this

Act: And provided further, That the Secretary shall make such appraisals and require the owners to present such documents as title, tax assessment, bills of sale, other paper, and other evidence which he may deem necessary for such determination.

Approved December 22, 1974.

7. 43 U.S.C. Sec. 315b Taylor Grazing Act

315b. Grazing permits; fees; vested water rights; permits not to create right in land

The Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time in accordance with governing law. Grazing permits shall be issued only to citizxens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws, and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands,

water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: Provided further, That nothing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this subchapter, grazing privileges recog-

nized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.

Historical Note

1976 Amendment. Pub.L. 94-579 substituted provisions authorizing fees to be fixed in accordance with governing law, for provisions authorizing fees to take into account public benefits to users of grazing districts over and above benefits accruing to users of forage resources and provisions requiring fees to consist of a grazing fee and a range-improvement fee.

1947 Amendment. Act. Aug. 6, 1947, provided for method to be used by the Secretary of the Interior in fixing the amount of grazing fees and by assessing a separate grazing fee and a range improvement fee.

Savings Provisions. Amendment by Pub.L. 94-579 not to be construed as terminating any valid lease, permit, patent, etc., existing on Oct. 21, 1976, see section 701 of Pub.L. 94-579 set out as a note under section 1701 of this title.

Legislative History. For legislative history and purpose of Act Aug. 6, 1947, see 1947 U. S. Code Cong. Service, P. 1638. See, also, Pub. L. 94-579, 1976 U. S. Code Cong. and Adm. News, P. 6175.

8. 28 U.S.C. Sec. 2501

Sec. 2501. Time for filing suit

Every claim of which the Court of Claims has

jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account. June 25, 1948, c. 646, 62 Stat. 976; Sept. 3, 1954, c. 1263, Sec. 52, 68 Stat. 1246.

8. A.R.S. §12-526.

A.R.S. Sec. 12-526 provides in pertinent part.

A person who has a cause of action for recovery of any lands, tenements or hereditaments from a person having peaceable and adverse possession thereof, cultivating, using and enjoying such property, shall commence an action therefore within ten years after the cause of action accrues, and not afterward. The peaceable and adverse possesion referred to above shall not embrace more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed if less than one hundred and sixty acres is so enclosed, but

when such adverse possession is taken and held under some written memorandum of title other than a deed which fixes the boundaries of the possessor's claim and is duly recorded, such possession shall be construed to be coextensive with the boundaries specified in such instrument.

Petitioners, Edward Bundrick, Ruby Bundrick and Yzobel Bundrick, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Federal Circuit entered on February 28, 1986.

## OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals (Appendix "A", pp 1-11) has not yet been officially reported. The March 18, 1985, opinion of the United States Claims Court (Appendix "B", pp 12-34) is reported at 7 Cl.Ct. 532 (1985).

## JURISDICTION

The opinion of the Court of Appeals was entered February 28, 1986, (Appendix "A"), and the jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

## STATEMENT OF THE CASE AND THE MATERIAL FACTS

Petitioners' are the holders in fee title of 1,914 acres of patented land in Southeastern Arizona. The land is situated in Pinal County and is located approximately 15 miles, by road, northeast of Winkelman, Arizona. Plaintiffs' land consists of two parcels. One parcel consists of 1,440 acres and the east parcel consists of 443.99 acres. The two parcels are connected by a road and constitute the base lands of a larger cattle operation since 1953.

In addition to the patented fee lands, Plaintiffs also leased 12,800 acres of land from the United States under the Taylor Grazing Act and an additional 6-1/2 sections of land from the State of Arizona. Both of the patented parcels are traversed by a stream known as Deer Creek, which is a valuable source of water for cattle operations.

The land of Petitioners is located in the San Carlos Mineral Strip. The Mineral Strip is an area of 232,000 acres which constituted part of the original San Carlos Indian Reservation. That reservation was created by Executive Order in 1872. However, many nonIndians believed the land contained valuable minerals and by agreement dated February 25, 1896, the Mineral Strip was ceded to the United States for exploration of the mineral resources. That treaty provided that the reservation lands would be open to occupation under the Mineral Law only.

Contrary to the treaty provisions, the United States, from 1896-1934, issued homestead patents covering some of the previously ceded lands in the Mineral Strip. The United States also erroneously granted ceded lands to the State of Arizona. The government first recognized its error in 1931 and on June 18, 1934, Congress passed the Indian Restoration Act. Pursuant to that Act, on September 19, 1934, the Secretary of the Interior directed that all undisposed lands, including the San Carlos Indian Reservation, be withdrawn from disposal.

Petitioners purchased their land in 1953 and obtained assignments of the Taylor Grazing leases, in addition to the State of Arizona leases. Petitioners built and maintained existing improvements and operated a cattle ranch until the events in controversy.

On June 17, 1963, the Under Secretary of the Interior issued Order 2874 which restored to tribal ownership all "mineral, oil and gas resources." That Order was made subject to "valid existing rights." On January 16, 1969, the Secretary of the Interior restored the surface of the lands to the tribe, again "subject to valid existing rights."

As a result of the 1969 Order, the San Carlos Tribe, through the BIA took over the former Taylor Grazing Act leases and on July 1, 1973, ended all leases with non-Indians in the Mineral Strip. Petitioners as well as other ranchers were served with notices of eviction from the lease land. Petitioners ended their cattle operation at that time, but continued to use their patented lands and State lease lands with occasional interruption from

the Tribe regarding permits required to be on the Reservation.

The next year, September, 1974, Congress passed Public Law 93-530, effective December, 1974, which Act directed the Secretary of the Interior to acquire through purchase and at "fair value" all privately held interests in the San Carlos Mineral Strip. The Act was passed because Congress felt that the Department of Interior acted contrary to law in homesteading the land and those who obtained the land and passed it on in good faith should not be made to suffer.

For the next three years, Petitioners awaited the Secretary's determination of fair value for their land and improvements. Petitioners received an appraisal on or about January, 1977, valuing their land and improvements at $250,432.00. The appraisals submitted in January, 1977 used a valuation date of January 24, 1969.

Petitioners objected to the date of valuation, as well as the value of some improvements. The United States reappraised some property but in a letter in 1979, refused to reappraise, also contending that Petitioner could never receive more than $300,000, by virtue of Public Law 93-530, even though the Bundricks owned 1,914 acres of the total 6,340 acres of homestead lands and 1,740 acres of mineral lands. Petitioners demanded a mineral appraisal which had never been completed and finally received a mineral appraisal for $10 per acre in 1981.

Petitioners brought suit in U.S. District Court seeking to quiet title and for a writ of mandamus seeking

to require the Secretary to pay fair value. The United States claimed sovereign immunity and the case was dismissed. The suit was transferred on Petitioner's motion to the U. S. Claims Court.

The U. S. Claims Court held that Petitioner's claims under the Fifth Amendment were barred because the 1969 Order of Restoration landlocked Petitioners in a reservation and effectively denied Petitioners' legal access to the patented lands. The Court also held that Petitioners' claims under Public Law 93-530 were barred by res judicata, the District Court having dismissed Petitioner's claim with prejudice. The Court of Appeals affirmed the holding that Petitioners' claims under the Fifth Amendment were time-barred, not because of the 1969 Order of Restoration but because Petitioners' lost legal access to their patented lands when the Apache Tribe cancelled the Taylor Grazing Act leases. The Court of Appeals reversed the holding of the Claims Court that any claim was res judicata since the District Court made no decision on the merits.

Petitioners bring this Petition seeking redress and a ruling that the accrual of their cause of action for a Fifth Amendment taking did not accrue in 1969 or 1973, but rather 1977 when Plaintiff was first put on notice of any adverse claim by the Government.

## REASONS AND ARGUMENT FOR GRANTING THIS PETITION

### I. THE COURT OF APPEALS DECISION IS CONTRARY TO THIS COURT'S DECISION IN U.S. V. DICKINSON AND ESTABLISHED PRECEDENT OF 40 YEARS.

The applicable statute regarding the period of limitations is 28 U.S.C. §2501. In this case, the applicable period is six years from the date "after the claim first accrues". The controversy or issue at bar is when did Petitioners' claim first accrue so as to start the running of the statute. The Appeals Court affirmed the Claims Court's alternative holding that as to Petitioners' patented lands, Petitioners had notice of the Government's claim no later than July, 1973. The Court reasoned that when the San Carlos Tribe canceled Petitioners' grazing leases, Petitioners were on notice that a "taking" of their base ranches and permanent land improvements had occurred. Therefore, the Court held Petitioners should have instituted suit no later than July, 1979. In United States v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947), this Court held that the six-year statute of limitations does not begin to run against a landowner until a servitude has been acquired either by agreement or in the course of time. In Dickinson, the Court held that the statute of limitations is not a technical rule of law to be applied, but one of practical application. Dickinson was a case involving

flooding of lands; specifically, it dealt with the question of when a cause of action accrues on a claim of inverse condemnation. The facts of the case are as follows: In order to improve the navigability of the Kanawha River, West Virginia, Congress authorized construction of the Winfield Dam, South Charleston (Act of August 30, 1935, 49 Stat. 1028, 1035, in connection with H. Doc. No. 31, 73d. Cong., 1st Sess., pp. 2-4). The water above the dam was to be impounded to create a deeper channel and to raise the river pool level in that area. Notice of the proposed pool elevation was given to abutting landowners on July 1, 1936, and the dam was completed and officially accepted by the United States on August 20, 1937. The river was to be raised by successive stages from 554.85 feet to 566 feet above sea level. That final level of 566 feet was not reached until September 22, 1938. As a result of the raising of the river, the land owned by the respondents was permanently flooded. In addition, erosion attributable to the improvement damaged the land which formed the new bank of the pool.

The principal argument by the United States on appeal was that the action was barred by the applicable statute of limitations, which was six years. The complaints were filed on April 1, 1943. The government argued that the statute began to run on October 1, 1936, when the dam began to impound water. In any event, it maintained that the six years began to run no later than on May 30, 1937, when the dam was fully capable of operation, the water was raised above its normal level, and the property of the respondents was partially submerged

for the first time. While according to the latter view, 'the time for taking had not run, under the statute, Dickinson's claim would be barred because he acquired the land after that date.

The Court rejected the Government's claim. In an opinion by Justice Frankfurter, the Court stated at 747-8:

> "The Government could, of course, have taken appropriate proceedings to condemn as early as it chose both land and flowage easements. By such proceedings it could have fixed the time when the property was 'taken'. The government chose not to do so. It left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could no longer be in controversy."

The Court noted that a claim of inverse condemnation traces back to the prohibition of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation" and stated that the Constitution is "intended to preserve practical and substantial rights, not to maintain theories". Quoting Davis v. Mills, 194 U.S. 451, 24 S.Ct. 695, 48 L.Ed. 1067 (1904).

In Dickinson, the Court held that the phrase "cause of action" should be interpreted in accordance with the

facts of individual cases, pointing out the danger of an inflexible and strict interpretation. In Davis v. Mills, supra, the Court commented that "cause of action" is one of the most theory-ridden of legal concepts and that is has "shifting meanings". The Court recognized the "danger of determining rights based upon definitions of a cause of action unrelated to the function which the concept serves in a particular situation". U. S. v. Memphis Cotton Oil Co., 288 U.S. 62, 53 S.Ct. 278, 77 L.Ed 619 (1933), Dickinson at pg. 748. In holding that Dickinson's claim was not barred, the Court fashioned a rule based upon the certainness of damages. See 748-49:

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'cause of action' - when they are born, whether they proliferate, and when they die. We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be

> brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him - for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim - the overflow due to rises in the level of the river - is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck."

So too, a rancher unsophisticated in the law "would not unnaturally postpone bringing a suit ... until the consequences of [trespass] have so manifested themselves that final account may be struck". In this case, just as in Dickinson, the Government has put the onus of determining the exact moment of taking on Petitioners. The decision of the Appeals Court puts the onus on the ranchers of knowing or realizing that the United States was making a claim on their land on July of 1973. The Appeals Court adopted the alternative holding of the Claims Court, that when the Tribe canceled Petitioners'

grazing permits, that act reduced of the value of their patented lands. The Court's reasoning is erroneous as it casts upon Petitioners the burden of knowing the exact date the taking took place, which commences the running of the limitations period. Dickinson provides that the statute does not begin to run until the equivalent of a prescriptive easement is acquired, as between private parties. In Arizona, adverse possession takes ten years. See: A.R.S. §12- 526.

The Appeals Court ignores the rationale of the Dickinson court which held that a landowner is permitted to wait, when the Government chooses not to condemn land, until all of his damages are ascertainable. In the case at bar, July 1, 1973 was only one of a series of acts affecting Petitioner's land holdings and improvements. In 1973, Petitioners' leases were terminated by the Tribe and the Bureau of Indian Affairs. At that time, it appeared that Petitioners would not be paid for their improvements under the general rule that improvements on Taylor Grazing lands are not compensable. These improvements were valued at $112,038 by Government appraisers, using a 1969 valuation date. In 1974, Congress provided that the ranchers would be paid for their improvements and that all of the fee land and improvements would be purchased by the Secretary of the Interior. In 1977, the first appraisals arrived, valuing land and improvements as of 1969. In 1978, Petitioners lost their State leases when the State of Arizona and the Federal Government entered into a consent decree. From 1977-1979, Petitioners lost their neighbors, all of whom settled with

the Government and moved.

Under the rationale of Dickinson, Petitioners could not have known in 1969 or 1973 that they would subsequently lose their improvements or their State leases. Petitioners could not be on notice that the Government was going to acquire the neighbors' land as well as their State leased land. Petitioners are entitled, under Dickinson, to ascertain the extent of the Government's actions causing them damage. It was not until 1977 that the Petitioners knew that the Government was valuing their lands and improvements as of 1969, eight years prior. The statute of limitations could not start running prior to 1977. Even then, the Petitioners lost the State-leased land through a consent decree in 1978, a fact which they could not have known prior to 1978.

The second reason that the Trial Court's finding affirmed by the Appeals Court is erroneous is that the Court is assuming that Petitioners are capable of making a legal conclusion. The statute of limitations, 28 U.S.C. §2501, uses an objective notice standard and one which applies to a landowner, not a lawyer. The trial court's conclusion that Petitioners were put on notice no later than July, 1973 raises the standard of discovery to making a legal conclusion that the access to the property is no longer enforceable on an Indian reservation. As the Dickinson Court pointed out, the statute of limitations is one of practical application. To hold Petitioners accountable for knowing that Indian Tribes enjoy sovereign immunity is contrary to established precedent and good sense. There was no evidence submitted which

showed that Petitioners knew of this legal conclusion or that their access was infringed. In fact, the evidence indicated that Petitioners continued to use their federal patented lands after 1973 without incident. Petitioners cannot be said to have been put on notice. The fact that the Appeals Court disagrees as to the time of taking is testament enough to the difficulty, if not the impossibility, of determining the precise moment of taking.

Nevertheless, the Appeals Court refused to so hold, instead it interpreted the series of Governmental and Tribal Acts occurring on or before July, 1973, as giving Petitioners notice that a taking had occurred.

The Court stated:

> "...[I]n July of 1973, they lost all grazing permits from the San Carlos Tribe, and were obliged to discontinue all ranching operations; they had no right to use the access road across tribal lands and they conceded their fee land had no market or mortgage value. The situation had become stabilized."

As is discussed infra, at 17, the taking of grazing permits by the Government or the Tribe, because such permits add nothing to the value of base ranch lands, and are not compensable interests in themselves, did not and could not have amounted to a taking. Therefore, no notice can be imparted to Petitioners that a taking had occurred. Furthermore, it is undisputed that Petitioners continued to live on their properties and had access to

their properties until they moved away in 1979. Surely Petitioners were not put on notice that their property had been taken when their right of access was "destroyed", because, as a practical matter, their right of access had not been destroyed. The 1969 Order specifically provided that interests in patented lands were not affected. Conceding that their fee lands had no market or mortgage value is merely a recognition by Petitioners that in retrospect the United States was in the process of acquiring the San Carlos Mineral Strip for the San Carlos Tribe and the United States was the only potential purchaser. Such admission cannot be construed as more than that. A recognition that Government action would eventually result in transfer of all lands to the Tribe naturally leads to a conclusion that the private market for Petitioners' land was non-existent. Such a recognition is not the equivalent of notice that there had been a taking under the rationale of Dickinson. The Appellate Court ignores the language of the 1969 Order of Restoration which specifically denies any adverse impact on patented land. The 1969 Order amounts to no more than a disclaimer deed or a quitclaim deed.

The Appeals Court concluded that "under Dickinson and related authority, the cause of action had accrued by July, 1973." Dickinson, as applied to the case at bar cannot be so interpreted.

In Dickinson, the Court indicated:

> "When dealing with a problem which arises under such diverse circumstances, procedural

> rigidities should be avoided. All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken'''. Id, at 749.

In the case at bar, the Government commenced the return of these lands as far back as 1941, with proclamations dating 1963 (sub-surface) and 1969 (surface). The Government commenced acquisition in 1974 by a continuing process of physical and legal events. Public Law 93-530. The appraisals started in 1974 and were completed in 1977 to 1979 and 1981 (mineral). Petitioners did not lose income from their ranching operation by ceasing their operation until 1973. The State lease land was acquired by consent decree in 1978, thus depriving Petitioners of that land in 1978. Petitioner Yzobel Bundrick moved off the land in 1979. In such a situation, when the Federal Government engages in a course of conduct resulting in a taking by a series of acts as in Dickinson and the case at bar, the burden of deciding when that taking occurs should not be harshly cast upon the landowner to decide the precise moment of taking. The final account was not struck until 1978 when Petitioners' last property was taken.

The accrual of Petitioners' cause of action is further complicated by the passage of Public Law 93-530, which required and directed the Secretary to appraise and

purchase all of Petitioners' land and improvements. That law is a recognition of Petitioners' claim and interest, not a denial nor an adverse claim. The statute of limitations should not run during the time the Secretary was appraising Petitioners' interests. See discussion, infra at 29. At no point had a final account been struck prior to 1978. Dickinson holds that a landowner should not be the one to make the decision as to the precise moment. The Court of Appals has held otherwise, contrary to Dickinson and 40 years of accepted precedent.

A similar situation was decided previously in Silverberg v. United States, 155 Ct.Cl. 436 (1961). In that case, slaughtering plants had been ordered beginning in 1943 to set aside and deliver certain quantities of beef to the armed services at maximum wholesale prices fixed by the Office of Price Administration. The order remained in effect until 1946. Suit was brought in 1951 for the difference between the wholesale price and the retail ceiling price. The court held that the action was not barred by the six-year statute of limitations. The taking was held not as a series of separate transactions, but rather pursuant to a continuous set-aside order. As in Dickinson, the court held that Petitioner was not required to institute a suit within six years of the first taking and then another suit for subsequent takings.

Dickinson has been followed in a long line of cases to the present day. As far as Petitioners' research indicates, Dickinson remains the leading case concerning when a cause of action accrues where the Government

intentionally or inversely condemns land or property. Dickinson strikes a balance between the private sector and the public sector where the Government chooses to acquire property by gradual dispossession, without condemning the property before hand.

In Castro v. United States, 500 F.2d 436 (Ct.Cl. 1974), the Court of Claims held that an action filed in 1968 was not time barred where it sought damages for the Government's destruction of 800 coconut trees on the island of Saipan. In 1944, the U. S. Government proclaimed a Military Government which was to respect private property rights. The coconut trees were destroyed in the invasion of 1944. However, Petitioner was not free to return to his property in an unrestricted manner until 1968. The Court held that 1968 was the proper date for the filing of Petitioner's claim for the loss of occupancy of his lands and his trees, holding that only then could Petitioner ascertain a final account. Accord: Oro Fino Consolidated Mines, Inc. v. United States, 92 F. Supp. 1016, 118 Ct.Cl. 18(1950), cert. denied, 341 U.S. 948, 71 S.Ct. 1015, 95 L.Ed. 1371 (1951); Avery v. United States, 330 F.2d 640,165 Ct.Cl. 357 (1964); Aaron v. United States, 311 F.2d 655, 167 Ct.Cl. 818 (1964); and Klein v. United States, 152 Ct.Cl. 221 (1961). See also: Terteling v. United States, 334 F.2d 350, 167 Ct. Cl. 331 (1964) involving a claim for damages arising from a continuing breach of contract.

The rule of law set forth in Dickinson is controlling and dispositive of the issue of the statute of limitations and the accrual of Petitioners' cause of action.

The Court of Appeals' decision, being in direct contravention, must be overturned.

The Government contends the crucial date in the case at bar to be 1973, but Petitioners are entitled to wait until all of the damage has been ascertained, which did not take place until 1978. The Government's acquisition of all other private lands, with the exception of Petitioners' was not consummated by the Government until 1979, the year the statute of limitations presumably ran. It should be remembered that at trial the Government contended there had been no taking at any time.

## II. THE COURT OF APPEALS' DECISION COMMENCES THE RUNNING OF THE STATUTE OF LIMITATIONS BEFORE A COMPENSABLE EVENT HAS OCCURRED AND IS CONTRARY TO U.S. V. FULLER, 409 U.S. 488 (1973)

### A. THE STATUTE OF LIMITATIONS CANNOT BEGIN TO RUN ON THE TAKING OF A NON-COMPENSABLE INTEREST IN REAL ESTATE

Petitioner's land holdings of 18,874 acres included 12,800 acres of land formerly leased under the Taylor Grazing Act, as well 4,160 acres of state lease land.

Under the Taylor Grazing Act, 48 Stat. 1270, as

amended, 43 U.S.C. §315(b), one acquires no compensable interest in leased land. The Act states that its provisions "shall not create any right, title, interest or estate in or to the lands." Id. Under the Taylor Grazing Act, ranchers have never been compensated for the taking of permitted use of grazing lands. Similarly, ranchers have never been compensated for the taking of improvements on permit lands.

This Court held in United States v. Fuller, 409 U.S. 488, 93 S.Ct. 801, 35 L. Ed.2d 16 (1973), that in determining the fair value of a base ranch which was condemned by the United States, the value of the base ranch attributable to its proximity to Taylor Grazing Act permit lands could not be taken into account in the valuation of the base ranch. Writing for this Court, Justice Rehnquist stated that "the Fifth Amendment does not require the Government to pay for that element of value based on the use of respondent's fee lands in combination with the government's permit lands." Fuller, supra. Yet the Court of Appeals' opinion makes the taking of the former Taylor Grazing lands the triggering event which caused the accrual of Petitioners' cause of action.

This case involves a peculiar fact situation where there is both a willing buyer and a willing seller. The United States indicated its interest in purchasing Petitioners' property and improvements when Congress passed Public Law 93-530. That law provided that the Secretary of the Interior was directed to purchase land within the San Carlos Mineral Strip. Included in the act are all improvements constructed, whether on Taylor Grazing lease

land or patented land or otherwise. That law was effective December, 1974, and provided the Secretary was to pay fair compensation. That law set in motion a series of further acts which culminated in appraisals of all land and settlement of a lawsuit with the State of Arizona. From 1977 to 1980 all landowners except Petitioners were bought out. Based upon appraisals completed in 1977-1979, and based on 1969 valuation dates, the government offered Plaintiffs $250,432. The offer as to improvements of $106,452 was accepted after minor adjustments but the value of land at $75 per acre was rejected because the valuation date was then 8-10 years old.

The Court of Appeals for the Federal Circuit held that Petitioner's claims were barred by 28 U.S.C §2501, which bars claims six years after they accrue. The Court of Appeals held that Petitioners' claims accrued when their Taylor Grazing leases were canceled in July 1973, because the value of Petitioners' fee lands were decreased by the loss of the Taylor Grazing lands. The Court of Appeals' holding is in direct contravention of this Court's holding in United States v. Fuller 409 U.S. 288, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973). In Fuller, Justice Rehnquist, writing for the majority, stated at 22:

> "The provisions of the Taylor Grazing Act quoted supra make clear the congressional intent that no compensable property right be created in the permit lands themselves as a result of the issuance of the permit. Given

> that intent, it would be unusual, we think, for Congress to have turned around and authorized compensation for the value added to fee lands by their potential use in connection with permit lands. We find no such authorization in the applicable congressional enactments."

It is certainly much easier to see in 1984 what the government's purposes and intents were ten years previous by having the benefit of history. However, in 1973, when the Court of Appeals presumes the commencement of the statute of limitations, all Petitioners knew was that the government had restored the 200,000 acres of land in the San Carlos Mineral Strip to the Apache Tribe subject to Petitioners "valid existing rights" and that Petitioners would no longer have their Taylor lease lands, and that the Order did not affect patented lands.

In 1973, all that Petitioners had was a complaint but no cause of action. Fuller declared that Petitioners could not sue for the loss of the lease land, nor could they contend the value of their base land was adversely affected by the loss of the federal lease lands. Nor could Petitioners complain that their improvements on their federal lease lands were taken. The law did not recognize Petitioners right to compensation for their improvements which they had placed on their Taylor Grazing lease land, yet the Court of Appeals commences the accrual of Plaintiffs cause of action concurrent with the loss of the Taylor Grazing leases.

## B. THE COURT OF APPEALS DECISION THAT PETITIONER'S EASEMENT OF INGRESS AND EGRESS WERE TAKEN BY THE 1969 ORDER OF RESTORATION IS CONTRARY TO THE LANGUAGE OF THE ORDER.

If the Court of Appeals is correct, what were Petitioners to sue for in 1973? Fuller held that Petitioners had no right to compensation for loss of the permit lands. The order of restoration in 1969 says that Petitioners vested rights are not affected nor are their patented lands affected. Yet the Court of Appeals held that by 1973 Petitioners had no right of access to their lands. If the Secretary did not intend to affect patented lands, it follows that Petitioners' right of access was not infringed, since easements of ingress and egress are part of the property right to land. Since the Order of Restoration clearly states that the order is both subject to valid existing rights and clearly states that the Order does not affect patented land nor to any interest in patented lands, one could properly assume that Petitioners still retain an easement of ingress and egress contrary to the opinion of the Court of Appeals.

Under the Court of Appeals' logic, Petitioners would be pressed to sue for a taking of their patented lands, an act which the 1969 order logically denies. The 1969 Order of Restoration amounts to a disclaimer of interest by the United States in both the patented land and hence the easements of ingress and egress. Such reasoning

defies logic and the equitable principle which formed the basis of the Court's opinion in Fuller.

The 1969 Order of Restoration expressly provides that it does not affect patented lands and further provides that it is subject to valid existing rights. No evidence was presented nor could any be presented that Petitioner did not have valid existing rights of ingress and egress. If in fact the Petitioners' rights of access were cut off in 1969, the United States should be estopped from any such claim. Petitioners continued to use the roads for access, and at trial, the B.I.A. representative testified that the roads in question were open to the public. Even if the access was cut off, Petitioners were certainly led to believe their rights were not affected. And if equitable principles are indeed applicable to condemnation proceedings, and presumably inverse condemnation proceedings, there is absolutely no equity in holding that what the government led Petitioners to believe to be true in 1969 was not in fact true, all to the detriment of Petitioners.

The Court of Appeals' holding that Petitioners lost their rights of access is without basis in equity and without basis in the record below. No government should be allowed to lead its citizens to believe that what the government claims not to be affected has in fact been affected all to the detriment of its citizens, and to the benefit of the government.

## C. PETITIONERS HAD NO COMPENSABLE INTEREST WHICH WAS TAKEN UNTIL THE PASSAGE OF PUBLIC LAW 93-350 EFFECTIVE DECEMBER, 1974

### 1. Improvements on Taylor Grazing Land.

This Court stated in Fuller that:

> "Congress may, of course, provide in connection with condemnation proceedings that particular elements of value or particular rights be paid for even though in the absence of such provision the Constitution would not require payment." Fuller, at 22.

Congress did provide, in this case, that "particular elements of value" be paid for. Public Law 93-530 made an exception to the general rule of noncompensability and provided that ranchers would be compensated for the value of permanent improvements on their permit lands. Section 2 of Public Law 93-530; 88 Stat. 1711 provides:

> "The Secretary [of the Interior] is authorized and directed to purchase from the owners all range improvements of a permanent nature placed under the authority of a permit from or agreement with the United States, on the lands restored to the San Carlos Apache

> Indian Tribe for the reasonable value of such improvements, as determined by the Secretary ..."

Public Law 93-530 created a clear exception to the long established rule that the Fifth Amendment does not require compensation for the "taking" of improvements on federal permit grazing lands. Absent Public Law 93-530, no Fifth Amendment "taking" claim accrued in Petitioner's owners when their improvements on Federal permit lands are taken. And it is only by virtue of the language and narrow applicability of Public Law 93-530 that Petitioners Bundrick have a statutorily grounded claim for compensation for improvements placed on these permit lands.

Because taking of range improvements absent Public Law 93-530 is not compensable under the Fifth Amendment, there was no Fifth Amendment claim on which the six-year statute of limitations contained in 28 U.S. C. §2501 could run prior to the passage of the Act. The Federal Circuit Court of Appeals erred when it affirmed the Court of Claims' holding that the Petitioners' Fifth Amendment claim for compensation for improvements accrued no later than July 1973 when the San Carlos Apache Tribe canceled the grazing permits. Holding that Petitioner's cause of action accrued no later than 1973, the Court of Appeals ruling commences the period of limitations before Petitioners had a compensable interest! It was not until December 22, 1974, that Public Law 93-530 became effective and gave Petitioners a right to compensation for

permit land improvements. This ruling is not only inequitable, but constitutes deprivation of due process to the extent that it strips Petitioners of a right to compensation by barring a claim before it accrues. How could Petitioners in 1973 be charged with knowledge that Congress would change the general rule of noncompensation for Taylor Grazing improvements in 1974?

**2. Base Ranch Fee Lands**

The same analysis is applicable to the holding of the Claims Court that Petitioners' cause of action under the Fifth Amendment for compensation for the taking of the base ranch fee lands also accrued on July 1, 1973.

The Claims Court reasoned that when the San Carlos Tribe canceled the grazing permits, that action, in itself, constituted a taking of the base ranch fee lands. The Court of Appeals affirmed this erroneous holding.

As discussed above, the "taking" of Taylor Grazing Act permit lands is not compensable under the Fifth Amendment. And as this Court held in United States v. Fuller, supra, no compensable value may be attributed to base ranch fee lands by virtue of their proximity to Taylor Grazing Act permit lands. It follows, therefore, that the revocation of permits to the grazing lands by the San Carlos Apache Tribe did not in any way diminish the value of Petitioners' base ranches for purposes of

the Fifth Amendment[1]. Yet the Court of Appeals, contrary to this Court's holding in Fuller, held that the statute of limitations commenced to run at that time. Without a legally cognizable dimunition of the fee lands, there was no cause of action against which the statute of limitations in 28 U.S.C. §2501 could run.

### 3. State Lease Lands

The Court of Appeals erred in affirming that the Petitioners' right to compensation for the permit land improvements on the base ranch fee lands and the state lease lands was time barred because it occurred in 1973. At the earliest, a taking of their Fifth Amendment compensable interests in state land improvements and lease lands occurred in 1978 when the State of Arizona agreed to a consent decree that its claim was void ab initio in return for equal acreage elsewhere in the State of Arizona. How can Petitioners' claim accrue in 1973 for the taking of the state lease land when Petitioners had full

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[1] As a practical matter, the value of the base ranches was diminished when the grazing permits were revoked, but this is irrelevant to the question of whether a Fifth Amendment compensable taking of the base ranches had occurred because there was no cognizable diminution in value of the base ranches, there can have been no taking on July 1, 1973.

use of land or improvements until 1978 when the consent decree was signed and Petitioners' 10 year leases were canceled. Fuller did not address the applicability of state leases on the values of patented land, and it would appear that valuing the patented land together with the state lease land would be proper. This diminution in value did not occur until 1978, one year before Petitioners' claim was lost according to the Court of Appeals. Thus, no final balance had been struck. Had Petitioners sued in 1973 and settled or gone to judgment, their claim for taking state lease lands or improvements would be barred by res judicata.

## III. THE COURT OF APPEALS' DECISION HOLDING THAT 1969 IS THE DATE OF VALUATION OF PETITIONERS' PROPERTY INTERESTS PURSUANT TO PUBLIC LAW 93-530 AMOUNTS TO AN UNCONSTITUTIONAL DEPRIVATION OF JUST COMPENSATION AND IS CLEARLY ERRONEOUS

The first paragraph of Public Law 93-530; 88 Stat. 1171 reads as follows:

> "The Secretary of the Interior (hereinafter referred to as 'Secretary') is hereby authorized and directed to acquire through

> purchase within the so-called San Carlos Mineral Strip as of January 24, 1969, all privately owned real property, taking title thereto in the name of the United States in trust for the San Carlos Apache Indian Tribe."

No act of Congress will be read as intending to violate the Constitution by legislative fiat. When Congress passes a law, it will be presumed that the law should be read in conformity to the Constitution. United States v. Vuitch, 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971).

Public Law 93-350 was passed in response to the widespread dissatisfaction of the Arizona ranchers who were adversely affected by the loss of their lease lands and ranch operations. Congress intended that those ranchers be bought out at "today's prices". The committee notes state:

> "The Committee however believes that the Department's position against compensation for base properties does not stand up to analysis. Numerous laws, including the Indian Reorganization Act, clearly authorize the purchase by the United States of inholdings within Indian Reservations for the purpose of providing lands for Indians. Furthermore, the language in the Appropriations Act (the Act of October 4, 1973, 87 Stat 429) limiting this authorization applies the limitation only to the States of

> Nevada, Oregon and Washington. The authorization continues in effect for reservation inholdings in Arizona. Finally, staff believes there would be no value as a precedent to any provision allowing purchase of Mineral Strip inholdings. Not only is the precedent already embodied in existing law, as noted directly above, but the facts in the Mineral Strip situation are sufficiently unique as to be easily distinguished from future inholding purchase requests. In most cases, the Federal Government allowed these Mineral Strip lands to go to patent for homesteading and other purposes despite the provision in the 1896 Act prohibiting disposal of the lands except under the mineral land laws. Clearly, the Department acted contrary to law in disposing of the land and those who obtained the land and passed it on in good faith should not be made to suffer. The Department should correct its mistake in law by purchasing back these inholdings at today's prices.'' [Emphasis added].

Both the Claims Court and the Court of Appeals interpreted the term 'today's prices', which is found in the Comments in 1974 to mean 1969 prices. Neither court cited precedent for its ruling, and not surprisingly, neither court addressed the issue of the increase in value which would be expected from 1969 to 1974. Since the Government has never contended that Petitioners' do

not have good title to their lands. there can be no authority for paying 1969 prices for land sought to be purchased in 1974, 1978 or 1986. To read Public Law 93-530 as mandating or permitting the valuation of property five years prior to the date of the legislation and nine years before the actual offer (or twelve years for mineral rights) amounts to a taking of the increase in value of Petitioners' land without compensation. Acts of Congress cannot be read as authorizing such an unconstitutional act.

To say that Petitioners are free to refuse the offer ignores the practicalities of the present situation which has been in existence since 1978. Petitioners have no neighbors and no market for their lands. Bundrick had an offer of $250 per acre for nonmineral land and $600 per acre for mineral land. The Government offered Bundrick $75 per acre, roughly 1/3 of its price, in 1978 for non-mineral land. Bundrick's mineral rights were appraised at $10 per acre, or 1/60 of the offer received in 1978-79. Yet, Petitioners presented uncontradicted testimony that in 1984 they could not find a realtor to list the property nor a banker to mortgage the property.

Public Law 93-530 must also be read in conjunction with the Fifth Amendment so as to effectuate the purchase at a fair value and so as not to deprive Petitioners of what Congress has promised and the Constitution guarantees. Both the Constitution and Public Law 93-530 promise that Petitioners' land will be purchased for fair value. And the testimony from Petitioners which was not controverted was that they expected the valuation to be

current with the appraisal. Petitioners testified that the first notice of a 1969 valuation was receipt of the appraisals in 1978. Then, and only then, were Petitioners advised of an adverse claim which could start the running of the statute of limitations. Construing Public Law 93-350 as mandating the use of a price eight years old takes from Petitioners the right to the increase in value of their land from 1969-1977. If Congress intended to buy at a fair price, it must be construed with the expressed intent to buy at today's prices. The Constitutional definition of just compensation means full and perfect equivalent for property taken. Olson v. United States, 292 U.S. 246, 54 S.Ct.704, 78 L.Ed. 1236 (1934); United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed 336 (1943), reh denied 318 U.S. 798, 63 S.Ct. 557,87 L.Ed. 1162; Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed 2d 1 (1973).

## IV. THE COURT OF APPEALS DECISION REQUIRES JUDICIAL RESOLUTION OF A CASE WITHOUT CONTROVERSY AND A CASE WHICH WAS NOT RIPE FOR RESOLUTION

Assuming that Petitioners commenced a lawsuit prior to 1978, the probable disposition would be that there was no justiciable controversy. Congress provided under

Public Law 93-530 that Petitioners were to be paid fair value for all of their patented land and improvements and that Petitioners were to receive a fair value. What issue was there to be decided? What controversy exists prior to the appraisals? Petitioners waited for three years, and then five years, for the appraisals and reappraisals only to be told that they had waited too long, and any claim against the Government for taking of their property, including their state lease lands which were lost in 1978, was barred by the statute of limitations. Equitable principles require a different result.

The case of Friedman and its progeny are instructive. Petitioners concede that the Fifth Amendment claim would not as an ordinary matter be governed by an administrative tribunal. But where Congress authorizes and directs the Secretary of the Interior to do an act which satisfies Petitioners' Fifth Amendment claim, the accrual of that cause of action should be tolled until the Secretary determines "fair value" to see if in fact there is anything to decree. Petitioners should not be penalized for waiting.

It is established law that where the Defendant has set up an administrative procedure for valuing claims, the statute of limitations is tolled. Here, Petitioners waited from 1974 to 1978 to receive appraisals. Reappraisals did not arrive until 1979. The testimony of the B.I.A. agent shows that upon his arrival, he was to set up appraisals for improvements and patented lands. Those appraisals were followed to the letter. The Defendant relied solely upon the appraisal and Defendant alleges to

have paid neither more nor less than the appraised price. Public Law 93-530 directs the Secretary of Interior to purchase all privately held interest on the San Carlos Mineral Strip. Under Public Law 93-530, he is directed "to make such appraisals as he may deem necessary". He shall "make a fair determination of compensation" for the property acquired under the Act. No court can require more than "fair value".

In Friedman v. United States, 159 Ct. Cl. 1, 310 F.2d 391 (1963) the Court held that where Congress has delegated the issue of determining a claimant's entitlement to some sort of pay to an official, the cause of action does not accrue until the official has acted or refused to act. Until the official has made a final decision, the statute of limitations is tolled.

Under Public Law 93-530, Congress has delegated authority to the Secretary of the Interior to make determinations of value for the patented land and improvements throughout the Mineral Strip. The Act mandates that the Secretary determine "fair value". There is a mandatory statutory scheme for determination of Petitioners' claims, which claims are the same claims as Petitioners have under the Fifth Amendment. Petitioners ask compensation for land and improvements, and the constitutional and statutory claims are presumably equal.

In Friedman, the Court noted that there are some cases where Congress has deliberately given an administrative body the function of deciding all or part of the claimant's entitlement and has interposed an administrative agency between the claim and the courts. These

cases include claims where a demand upon the Secretary is necessary.

Clearly, Congress delegated authority to the Secretary under Public Law 93-530. Not only is the Secretary directed to purchase, he is directed to "make a fair determination of compensation for property acquired pursuant to this Act." The Secretary is instructed to make a fair determination and to require presentation of evidence. He is further authorized to have the land and property appraised. Until the Secretary has completed these duties and made a final decision, Petitioners' action under the statute, and hence the Fifth Amendment would not be ripe.

In point of fact, two previous lawsuits which pertain to this Reservation were dismissed for lack of a controversy. The legislative notes to Public Law 93-530 summarize the litigation:

> "During the pendency of the Tribe's application for restoration, a number of the ranchers who had testified against restoration at the Globe hearing filed an action in Federal Court to block the restoration. The action, in which the State of Arizona later intervened as a party Petitioner was finally dismissed when the Court held that there was no case over which it could assume jurisdiction. In ordering the dismissal, the Court reasoned that there was no controversy because, first, the Tribe had withdrawn its application for the restora-

> tion of the surface, and second, Secretarial Order No. 2874 had been made subject to valid existing rights and had also specifically excluded patented lands and the surface of the Mineral Strip (Bowman v. Udall, 243 F. Supp. 672 (D.D. Cir. 165), aff'd sub. nom. Hinton v. Udall, 364 F.2d 676 (D. D.Cir.), cert. denied 385 U.S. 878 (1966)."

Two other ranchers previously had their lawsuits dismissed because their suits did not present a controversy. Since the 1963 Order had been "subject to valid existing rights' there was no case." Yet, the 1969 Order, which had the same language, is now called the triggering act which gave Petitioners notice of the Government's adverse claim, because Petitioner conceded that there has probably been no market for this land.

Petitioners' problem is either one of filing too soon or too late. On the one hand, a lawsuit filed within six years of January, 1969, or January, 1975, would certainly be subject to dismissal on the grounds that there is no controversy. Having passed Public Law 93-530, the Government is saying that it will pay fair value for all of the land and improvements. A court cannot order any more than payment of fair value, whether the basis be the Constitution or statute. It is only where a dispute arises over what is fair value that a case or controversy exists for adjudication. Until the appraisals arrived in December, 1977 there was no dispute to adjudicate.

To be a justiciable controversy, the facts must present a real and substantial question, admitting of specific relief through a judgment which is conclusive, as oppossed to mere opinion as to what the law would be upon a certain set of facts. Aetna Life Ins. co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L. Ed. 617 (1937), reh. denied 300 U.S. 687, 57 S.Ct. 667, 81 L.Ed. 889 (1937).

A justiciable case cannot be made by a proposed misreading of a statute and a claim of injury therefrom. Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981). And where the only possible harm which could result from the application of a new rule would be to future plaintiffs, a suit challenging its constitutionality is not considered ripe for adjudication. John v. Sikes, 730 F.2d 644 (11th Cir. 1984).

Friedman has been followed in a larger number of cases. See: Bruno v. United States, 556 F.2D 1104 (Ct. Cl. 1977); Garcia v. United States, 617 F.2d 218 (Ct.Cl. 1980); Dzialo v. United States, 677 F.2d 873 (Ct.Cl. 1982). In Bruno v. United States, supra, the Court held that where any administrative decision "is tentative or...withholds a final decision pending consideration of some new evidence, or expressly invites, on the record, the Petitioner to seek a reopening at some later date", then as a matter of law the ..."decision is not final and the statute of limitations does not begin to run." Under the Bruno case, it can be seen that Public Law 93-530 was an act providing compensation subject to evaluation and appraisal by the Secretary of the In-

terior. As such, the statute of limitations could not begin to run until 1980 when the Secretary asked for no more information and refused to reappraise or reconsider its opinion. Only then did the administrative determinations required in Public Law 93-530 become final.

In Garcia v. United States, supra, a statutory requirement imposed upon an agency was held to toll the statute of limitations. Likewise, in Dzialo v. United States, supra, it was asserted that because of Friedman "no claim accrues ... until there has been an administrative determination of (Petitioner's) right". In the present situation, the Petitioners' rights as to their just compensation for their property was not administratively determined until 1978 or 1980. The Friedman rationale is clearly applicable in the present situation, and it was error for the trial court and the Court of Appeals to hold otherwise. The United States Claims Court in Gerber v. United States, 2 Ct.Cl. 311 (1983) itself cited both Dzialo, supra, and Friedman for the proposition that "no cause of action accrues until there has been an administrative determination of a claimant's right". That case, like Friedman, also applied to military or governmental disability or retirement pay.

Petitioners do not claim that a Fifth Amendment inverse condemnation claim would be subject to an administrative tribunal. But where as here, Congress has authorized and directed the Secretary to appraise and purchase Petitioner's interest, postponing Petitioner's cause of action seems logical and equitable. The statute is tolled because the statute on its face requires com-

pensation which satisfies Petitioners' Fifth Amendment claims. Until Petitioners realized that the Department intended to pay less than what Petitioners consider fair value, there was no case to adjudicate. One cannot presuppose the Secretary will read the law to authorize payment of a price 8-12 years old in 1981. Allowing Petitioners time to try to settle their claim through a non-judicial procedure would be consistent with federal jurisprudence requiring an actual case or controversy. The postponing of a lawsuit until the Secretary makes a final decision also seems judicious.

## V. THE GOVERNMENT IS ESTOPPED FROM ASSERTING THE ALLEGED LACK OF ACCESS AS THE CAUSE OF ACCRUAL OF PETITIONERS' ACTION

The last paragraph of the 1969 order restoring the San Carlos Mineral Strip to the San Carlos Tribe states "This order shall not affect any patented lands located within the mineral strip." Based on this language, the federal government should be estopped from asserting any loss of access, if indeed there was, as the applicable taking or the accrual of Petitioners' cause of action. Petitioners have been affirmatively misled into believing their lands were not affected. Several cases have held that estoppel may be asserted against the government only where there has been affirmative misconduct. This Court

held in Schweiker v. Hansen, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981) that estoppel would not be asserted where a social security administration worker told a woman she was not eligible for benefits, when in fact she was. It was held that the conduct must be of such character so as to constitute "affirmative misconduct". See Schweiker, 101 S.Ct. at 1471. However, Schweiker has been read to allow the equitable estoppel theory against the United States.

In Johnson v. Williford, 682 F.2d 868 (9th Cir. 1982), it was determined that:

> "In general, equitable estoppel is not available as a defense against the government, especially when the government is acting in its sovereign, as opposed to its proprietary capacity. Nevertheless, this court has held that where justice and fair play require it, estoppel will be applied against the government, even when the government acts in its sovereign capacity if the effects of estoppel do not unduly damage the public interest. The Supreme Court has never explicitly endorsed this theory although no fewer than eight circuits have stated that there are some circumstances in which the government will be estopped." Johnson v. Williford, at 871.

In Hansen v. Harris, 619 F.2d 942 (2nd Cir. 1980), the 2nd Circuit Court of Appeals found estoppel against

the government in a situation identical to Schweiker, supra, and the Supreme Court refused to reverse. Moser V. United States, 341 U.S. 41, 82 S.Ct. 553, 95 L.Ed. 729 (1951), also cited by Johnson v. Williford, supra, involved a limited form of estoppel against the United States in an immigration case, although the Court stated there was actually no need to apply estoppel.

In Northern Life Ins. v. United States, 685 F.2d 277 at 279 (9th Cir. 1982), it was held that estoppel may lie against the government if the Petitioner relies on an act to his detriment under circumstances where he could reasonably rely on that act. There is no reason why Appellants in these cases should not have seen it reasonable to rely on the 1969 Restoration Order which specifically stated Petitioners' patented lands would not be affected! The government should be estopped from asserting loss of access as the applicable taking or the date that Petitioners' cause of action arose.

It is affirmative misconduct to now hold that the loss of access was the event of taking of Petitioners' land when the 1969 Order itself stated that the restoration did not affect patented lands. The passage of Public Law 93-350 also appears to be a recognition of Petitioners' valid interests rather than a denial of those interests.

Nor does the analysis of misconduct stop in 1969. The whole problem of Petitioners' land and improvements is directly related to the wrongful issuance of patents on land which the Government was obligated to open up only under the mineral laws. Not only did the Government

issue patents, considered the highest form of title, it allowed the State to select certain lands in the strip. Finally, the Government opened up some 200.000 acres to ranching, which was also expressly forbidden by the Treaty.

Were the Government a private party, its error could have been discovered by an abstract or title policy. Most searches end or begin from a patent issued by the United States. The holding by the Court of Appeals that the loss of access from the proclamation of 1969 which disclaimed any interest in patented lands or any effect on patented lands was the first step of acquiring Petitioners' property and should reasonably have put Petitioners on notice of Defendant's adverse claim is patently inequitable. A party who represents one thing and does another is guilty of affirmative misconduct. If indeed the loss of access is the final event in the taking, the Government should be barred under the principle of equitable estoppel from so asserting.

This Court has held that neither the government nor a landowner can profit from appreciation or diminution in value caused by the government's acts in condemning. United States v. Cors, 337 U.S. 325, 69 S.Ct. 1086, 93 L.Ed 1392 (1949). See also U.S. v. Rands, 389 U.S. 121, 88 S.Ct. 265, 19 L.Ed.2d 329 (1967); United States v. Twin City Power Co., 350 U.S. 222, 765 S.Ct. 259, 100 L.Ed. 240 (1956). reh denied 350 U.S. 1009, 76 S.Ct. 648, 100 L.Ed. 871 (1956). It would seem that a government which cannot profit by a diminution in value by its acts ought not profit by affirmatively disclaming interest in

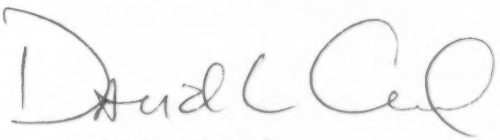
Petitioners' lands while at the same time claiming that Petitioners lost their access by virtue of the 1969 Order which disclaimed any effect on Petitioners' land.

A sovereign owes a greater duty to its citizens and should be held to a higher standard.

## CONCLUSION

Based upon the foregoing, we submit that this Petition for Writ of Certiorari to the Court should be granted.

Respectfully submitted,



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# APPENDIX

## TABLE OF CONTENTS


| | | Page |
|---|---|---|
| APPENDIX "A" | Opinion of the Federal Circuit Court of Appeals Dated February 28, 1986 | 1 |
| APPENDIX "B" | Opinion of the United States Claims Court Dated March 18, 1985 | 12 |
| APPENDIX "C" | Order and Judgment of the United States District Court For the District of Arizona Dated November 29, 1982 | 35 |

## APPENDIX "A"

Opinion
Dated February 28, 1986

**UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

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Appeal No. 85-2316

EDWARD BUNDRICK, RUBY BUNDRICK,
AND YZOBEL BUNDRICK,

*Appellants,*

V.

THE UNITED STATES,

*Appellee.*

David L. Curl, Barassi & Curl, P. C., of Tucson, Arizona, argued for Appellants.

Laura Frossard, Department of Justice, of Washington, D.C., argued for Appellee. With her on the brief were F. Henry Habicht, II, Assistant Attorney General and David C. Shilton.

Appealed from: U. S. Claims Court
Judge White

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DECIDED: February 28, 1986

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Before DAVIS, Circuit Judge,
MILLER, Senior Circuit Judge, and
NEWMAN, Circuit Judge.

NEWMAN, Circuit Judge.[sic]

Appellants Edward Bundrick, Ruby Bundrick, and Yzobel Bundrick (the Bundricks) appeal from the decision of the United States Claims Court dismissing their claim in inverse condemnation against the United States. This appeal was consolidated for argument with that of Alder v. United States, No. 85-2317, also decided this day.

For details of the background of this case, reference is made to the findings and opinion of the Claims Court, 7 Cl. Ct. 532 (1985). Unlike the Alder case, the Claims Court decided only the Bundricks' Fifth Amendment issues, holding that all issues arising under Public Law 93-530, the San Carlos Mineral Strip-Purchase, 88 Stat. 1711 (1974), were res judicata in view of the dismissal with prejudice by the United States District Court for the District of Arizona of "claims encompassed by the complaint other than the inverse condemnation claim."

The Bundricks' complaint before the district court contained a count to quiet title and a count in the

nature of mandamus to the Secretary of the Interior - actions over which the Claims Court does not have jurisdiction, 28 U.S.C. §1491 (a) - and a Fifth Amendment taking count. The district court transferred the taking count to the Claims Court and dismissed the other claims with prejudice.

The government asserts that the dismissal, although silent on the merits of any claim, was an adjudication of all the dismissed claims on the merits under Rule 41(b) of the Federal Rules of Civil Procedure, and thus is res judicata.

The Bundricks argue that the Arizona district court had no subject matter jurisdiction over the Public Law 93-530 claim, and therefore that this claim cannot be encompassed in the dismissal. The district court gave no reason for its dismissal with prejudice of "all [other] claims", but if the district court correctly determined that it had no jurisdiction over a Tucker Act Public Law 93-530 claim, its dismissal cannot be res judicata against this claim in its proper forum. And if the district court intended merely to dismiss the quiet title and mandamus actions, this dismissal cannot be res judicata against a different claim for money damages. Rules 41(b) of the Federal Rules of Civil Procedure is clear with respect to jurisdiction:

> . . . a dismissal . . . other than a dismissal for lack of jurisdiction . . . operates as an adjudication upon the merits.

See also International Philanthropic Hospital Foundation, 621 F.2d 402, 404-05, 223 Ct.Cl. 587, 591-92 (1980) (dismissal for lack of subject matter jurisdiction not

given res judicata effect where the district court did not have jurisdiction to decide the action's merits): 5 J. Moore, J. Lucas & J. Wicker, Moore's Federal Practice, ¶41.14 (2d ed. 1985).

Nor do we find support for the government's argument on "issue preclusion". The district court offered neither findings of fact nor conclusions of law on any of the issues in the complaint, nor any reasons for its sweeping dismissal. As was stated in a Court of Claims analysis of the effect of a stipulated dismissal with prejudice, by a federal district court, of a cause over which that court did not have subject matter jurisdiction:

> The intention of the court to make a determination on the merits may be important, but if the judgment is clearly not on the merits, the court's intention to make it a bar is immaterial. The words "with prejudice" add nothing to the effect of the judgment in such a case, no matter what light they throw on the intention of the court.

International Philanthropic Hospital Foundation, 621 F.2d at 405, 223 Ct. Cl. at 593 (quoting Goddard v. Security Title Ins. & Guarantee Co., 14 Cal.2d 47, 92 P.2d 804, 808 (1939). In that case the Court of Claims concluded that the words "with prejudice" merely precluded the parties from again bringing before that court a claim over which it had no jurisdiction. 621 F.2d at 405, 223 Ct. Cl. at 593.

In the case before us, there is inadequate basis in the record for concluding that the Arizona district court

intended to have adjudicated the title and mandamus counts, and we have remarked on the absence of Rule 52(a) findings as required by Rule 41(b). The district court did not conduct a trial on, hear argument on, or decide the value of any of the Bundricks' property compensable by Public Law 93-530. The district court had before it a motion for summary judgment which it decided on the pleadings, and thus it could not have adversely decided the contested factual questions of value. Nor did the district court state that it was reaching a summary judgment when, without comment on their merits, it dismissed "all [other] claims encompassed by the complaint".

The counts for declaratory and mandamus relief that were dismissed by the district court, whether denied on jurisdictional or other grounds, were not pursued before the Claims Court. We conclude that the Claims Court erred in holding that the entire "Public Law 93-530 ... aspect of the case" is res judicata. 7 Cl. Ct. at 539.

A. Public Law 93-530

Although appellants have intertwined the issues arising from Public Law 93-530 and those based on the Fifth Amendment, the Claims Court properly separated them. As discussed supra, the Claims Court erroneously denied judicial review to the Tucker Act claim under Public Law 93-530 that was properly before it, namely, the value of the fee land and improvements. In Snowbank Enterprises, Inc. v. United States, 6 Cl. Ct. 476 (1984), the Claims Court reviewed a property valuation by the Secretary of Agriculture in implementation of a similar remedial statute. In the Alder case the Claims Court

stated that it assumed, without deciding, that it had jurisdiction to review the correctness of the property valuation. It did not do so in the Bundrick's case, in the belief that all Public Law 93-530 issues were res judicata.

The Bundricks assert that the valuation of their fee land was too low, although they accepted a revised appraisal for the value of improvements on their federal and state leased lands. They also assert that the trial was for liability only, and this error was compounded when the Claims Court held that the only issue properly before it was Fifth Amendment liability. Since the Claims Court held that the Bundricks' Fifth Amendment claims were time barred, as discussed infra, the court made no findings on issues of valuation. For the Public Law 93-30 claims, liability was not at issue for either the fee lands or the improvements on the leased lands. The only issue requiring judicial attention was the amount of payment.

In the Alder decision we affirmed the Claims Court's holding that the valuation conditions set in Public Law 93-530 were not unreasonable, and that the Secretary reasonably executed the statute in valuing the improvements on the leased land, and the fee land, as of January 1969. See Chevron USA, Inc. v. Natural Resources Defense Council, 104 S. Ct. 2778, 2782-83, reh'g denied, 105 S. Ct. 28 (1984).

The Claims Court did not discuss the Bundricks' alternative appraisals of the fair market value of either their fee land or the improvements on the leased land. The record shows that issues pertinent to the land value

were the subject of evidence, argument, and briefs. We remand to the Claims Court for appropriate findings as to the reasonableness, or lack thereof, of the Secretary's administration of Public Law 93-530 as applied to the Bundricks[1].

B. The Fifth Amendment

Jurisdiction for claims in inverse condemnation arises under the Fifth Amendment of the Constitution. In accordance with 28 U.S.C. §1491:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

As stated in United States v. Testan, 424 U.S. 392, 401 (1976), "[Just compensation] Fifth Amendment cases are tied to the language, purpose, and self-executing aspects

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[1] The Claims Court stated, by footnote to its slip opinion, Bundrick v. United States, No. 622-82L, slip op. at 13 (Cl. Ct. March 18, 1985), that a claim by the Bundricks under Public Law 93-530 for the value of the improvements on the federal lands was time barred. We do not agree. It is uncontroverted that the United States refused to pay the Bundricks the improvement valuation unless the fee land value was settled. There is no basis in the statute or in law to hold that the Bundricks were required to have tried to collect a portion of an undivided and, according to the government, indivisible claim.

of that constitutional provision", citing Jacobs v. United States, 290 U.S. 13, 16 (1933). See also United States v. Mitchell, 463 U.S. 206, 216 (1983)("If a claim falls within the terms of the Tucker Act [28 U.S.C. §1491], the United States has presumptively consented to suit.")

In considering the Bundricks' claim under the Fifth Amendment for the taking of improvements on land they originally leased under the Taylor Grazing Act, 43 U.S.C. §§ 315-315g, 315h-315m, 315n and 315o-1, and after January 1969 leased from the San Carlos Apache Tribe, the Claims Court referred to established law that improvements run with the land, and remarked that the Bundricks had presented no reason why that law does not here apply, especially when it was not disputed that the Bundricks had no compensable interest in the leasehold. The Claims Court also held that any such claim accrued no later than July 1, 1973, the expiration of the final lease from the San Carlos Apache Tribe, and thus was time barred under 28 U.S.C. § 2501, the Arizona District Court action having been filed on October 16, 1981. Soriano v. United States, 352 U.S. 270, 273 (1957); Kirby v. United States, 201 Ct. Cl. 527, 539 (1973), cert. denied, 417 U.S. 919 (1974); Parker v. United States, 2 Cl. Ct. 399, 402 (1983).

With respect to the Bundricks' fee land within the San Carlos Mineral Strip, the Claims Court reasoned first that the taking occurred in January 1969, on the basis that access to the fee land was possible thereafter only by sufferance of the Indian authorities. When the grazing permits on the adjacent land, owned by the San Carlos

Apache Tribe since 1969, were terminated by the Tribe as of July 1973, the Bundricks stated that "plaintiffs ceased their cattle operation and sold their cattle." The Claims Court held that the taking claim for the fee land was time barred under 28 U.S.C. § 2501.

Appellants argue that this holding is incorrect, asserting that there was no time certain at which a taking could reasonably have accrued prior to the valuation of their property in 1977-78, when it first appeared to the Bundricks that they might not receive adequate compensation under Public Law 93-530. The Bundricks state that the mineral appraisal was not completed until 1981. They argue that their property rights were continuously affected, starting in 1969, worsening in 1973, and continuing through at least 1977-79 when their last neighbors left and their access to the leased state lands was lost on settlement of litigation between the State of Arizona and the United States. As discussed in Alder, the loss by the state in 1978 of rights that may have benefited the Bundricks is not pertinent to when the federal taking claim accrued. Nor did negotiations in implementation of Public Law 93-530 toll the statute as applied to the Fifth Amendment claim. For the Bundricks, by July of 1973, they had lost all grazing leases from the San Carlos tribe; they had after January 1969 no right to use the access road across tribal lands; and they conceded that their "landlocked" fee land was not marketable or mortgageable. The situation had "become stabilized" by July of 1973, and under United States v. Dickinson, 331 U.S. 745, 749 (1947), and related authority, the cause of action for inverse condemnation had

accrued. We have carefully considered the arguments concerning easements over public lands, and estoppel, but are not persuaded that any legal theory negates the accrual of the taking claim.

We affirm the decision of the Claims Court that the Fifth Amendment taking claim is time barred, reverse the holding of res judicata, and remand for consideration of issues in connection with Public Law 93-530.

AFFIRMED-IN PART,
REVERSED-IN-PART,
AND REMANDED

## APPENDIX "B"

Opinion
Dated March 18, 1985

## IN THE UNITED STATES CLAIMS COURT

No. 622-82L

EDWARD BUNDRICK, RUBY BUNDRICK, AND YZOBEL BUNDRICK,

*Plaintiffs,*

V.

THE UNITED STATES,

*Defendant.*

David L. Curl, Tucson, Arizona, for plaintiffs. Louis W. Barassi, of counsel.

Patricia N. Young, with whom was Assistant Attorney General F. Henry Habicht II, Washington, D.C., for defendant.

## OPINION

WHITE, Senior Judge.

The plaintiffs in this case seek to recover for the alleged taking by the United States, through inverse condemnation, of an interest in 1,913.99 acres of land and related improvements, situated in Pinal County, Arizona.

Plaintiffs Edward Bundrick and Ruby Bundrick are husband and wife. Plaintiff Yzobel Bundrick is the mother of Edward Bundrick.

The land involved in the case (which, for the sake of convenience, will sometimes be referred to hereafter in the opinion as "the Bundrick land") is owned by plaintiffs Yzobel Bundrick and Edward Bundrick, the former owning an undivided three-fourths interest and the latter owning an undivided one-fourth interest in the land. (As plaintiff Ruby Bundrick appears to be a party to the case only because she is married to plaintiff Edward Bundrick, the term "plaintiffs," as used subsequently in the opinion, will refer only to plaintiffs Yzobel Bundrick and Edward Bundrick, unless the context plainly indicates otherwise.)

The litigation was first instituted in the United States District Court for the District of Arizona. The complaint, as filed with the District Court, coupled the inverse condemnation claim with certain other claims

against the United States. On November 29, 2982, the District Court entered an order and judgment which dismissed with prejudice "all claims encompassed by the complaint other than the inverse condemnation claim," and transferred the case to this court (as successor to the former United States Court of Claims) for proceedings relative to the inverse condemnation claim.

After the conclusion of pretrial proceedings, a trial was held by this court during the latter part of November 1984 in Phoenix, Arizona. The parties requested and were granted an opportunity to file post-trial briefs and requested findings; and this procedure was completed on February 27, 1985.

## The Bundrick Land

The Bundrick land is divided into two separate parcels, which are sometimes referred to in the record as "the west parcel" and "the east parcel." The west parcel includes a total of 1,440 acres and consists of the NE 1/4 of Section 27 and all of Sections 26 and 35, Township 4 South, Range 17 East, Gila and Salt River Base and Meridian, Pinal County, Arizona. The east parcel includes a total of 473.99 acres and consists of the S 1/2 SE 1/4 and the SW 1/4 of Section 5, and the N 1/2 SE 1/4, the SW 1/4 NE 1/4, the S 1/2 NW 1/4, and the NW 1/4 NW 1/4 of Section 6, Township 5 South, Range 18 East, Gila and Salt River Base and Meridian, Pinal County, Arizona.

A distance of 1 mile separates the two parcels at the nearest points. The east parcel lies to the southeast of the west parcel.

Both the west parcel and the east parcel are traversed by Deer Creek, a valuable source of water.

The plaintiffs' titles to the tracts of land comprising the two parcels are traceable to several homestead patents that were issued by the United States between 1896 and 1934. The validity of the titles is not questioned by the defendant in this litigation.

The Bundrick land is located approximately 15 miles, by road, northeast of Winkelman, Arizona.

The Bundrick land was acquired in 1953 by plaintiff Yzobel Bundrick and her husband, for use as part of a cattle raising operation. At about the same time -- as the Bundrick land itself did not contain sufficient acreage for a viable cattle operation in that part of Arizona -- plaintiff Yzobel Bundrick and her husband acquired from the State of Arizona leases on approximately 6-1/2 sections of land; and they acquired from the United States (represented by the Department of the Interior) leases on approximately 12,800 acres of federal land that the Interior Department was administering under the Taylor Grazing Act (43 U.S.C. § 315 et seq. (1982)). At that time, and in the ranching region of Arizona, if a person owned patented land and there was adjacent to it state or federal land not under lease to someone else, the landowner was given an opportunity to lease the state or federal land. The leased lands were contiguous to the Bundrick land at some point. The combination of the Bundrick land and the leased lands provided plaintiff Yzobel Bundrick and her husband with sufficient acreage for the establishment and operation of a cattle ranch. The ranch was operated for approximately 20 years.

Plaintiff Yzobel Bundrick and her husband made permanent improvements on both the land leased from the State of Arizona and the land leased from the Department of the Interior. A residence, a shack, fences, and corrals were constructed, and two wells were dug, on the state land; and the Bundricks made their home in the residence. Fences, another corral, and a scale for weighing cattle were built on the federal land.

In later years, the ranching operation was conducted by plaintiff Yzobel Bundrick and her son, plaintiff Edward Bundrick, although the latter never lived on the ranch.

The San Carlos Mineral Strip

The Bundrick land and the leased lands which formed part of the Bundrick ranch were all located within the exterior boundaries of the area known as the San Carlos Mineral Strip (which, for the sake of convenience, will sometimes be referred to hereafter in the opinion as "the Mineral Strip").

The Mineral Strip is an area of approximately 232,000 acres. When the San Carlos Indian Reservation was set aside by Executive Orders in 1871 and 1872 for the San Carlos Apache Indian Tribe, the Mineral Strip was part of the reservation. After the creation of the San Carlos Indian Reservation, however, non-Indians who believed that the Mineral Strip contained valuable mineral deposits sought to take the Mineral Strip from the Indians. The Appropriations Act of March 2, 1895, authorized negotiations with the San Carlos Apache Indian Tribe for the cession of the Mineral Strip; and a cession

agreement was reached on February 25, 1896. Subsequently, pursuant to the Act of June 10, 1986, the Mineral Strip was ceded formally to the United States by the tribe and became federal land. The cession was made, however, under the condition that such land would be "open to occupation, location, and purchase under the provisions of the mineral land laws only." (The land of the Mineral Strip will sometimes be referred to hereafter in the opinion as "ceded" land.)

From 1896 to 1934, the United States issued homestead patents covering some ceded lands in violation of the restriction that entry was to be permitted only under the provisions of the mineral land laws; and the United States also erroneously granted some ceded lands to the State of Arizona as school and indemnity lands. In order to prevent further error, the First Assistant Secretary of the Interior on March 30, 1931, withdrew the remaining Mineral Strip lands from all forms of entry or disposition.

On June 18, 1934, Congress passed the Indian Reorganization Act (48 Stat. 984; codified as 25 U.S.C. § 461 et seq. (1982)). The Secretary of the Interior was expressly authorized by 25 U.S.C. § 463 to restore to tribal ownership the remaining surplus lands of any Indian reservation opened before June 18, 1934. Not long thereafter, on September 19, 1934, the Secretary of the Interior directed that all undisposed lands of certain Indian reservations, including the San Carlos Indian Reservation, be withdrawn from disposal temporarily, until a determination could be made regarding permanent

restoration to tribal ownership of such lands, as authorized by the Indian Reorganization Act. (The Mineral Strip lands had already been withdrawn from disposition.)

In June 1941, the First Assistant Secretary of the Interior approved an agreement made by certain other officials of the Department of the Interior (i.e., the Assistant Commissioner of Indian Affairs, the Commissioner of the General Land Office, and the Director of Grazing) to place the Mineral Strip lands under temporary range management, in accordance with the provisions of the Taylor Grazing Act, until final disposition of such lands could be made. Following this agreement, grazing permits and leases were issued by the Department of the Interior to various individuals for the conduct of ranching operations on the ceded lands, other than those patented to individuals or granted to the State of Arizona. Such leases were obtained by plaintiff Yzobel Bundrick and her husband in 1953, covering approximately 12,800 acres of ceded land adjacent to the Bundrick land.

On June 17, 1963, the Under Secretary of the Interior issued Order No. 2874 (28 Fed. Reg. 6408), which restored all "mineral, oil and gas resources" in the Mineral Strip to the San Carlos Apache Indian Tribe, "subject to any valid existing rights." This order, however, expressly excluded from its provisions any patented lands, and subsurface interest in patented lands, situated within the Mineral Strip.

On September 2, 1968, the San Carlos Apache Tribal Council adopted a resolution requesting the Secretary of the Interior to restore to tribal ownership the surface interest in lands within the Mineral Strip. Some months

later, on January 16, 1969, the Secretary of the Interior signed an order which restored the surface of the lands within the Mineral Strip to the tribe, subject to valid existing rights. The order was published on January 24, 1969 (34 Fed. Reg. 1195). The lands affected by this order, including the 12,800 acres of land previously leased to the Bundricks pursuant to the Taylor Grazing Act, thus became part of the San Carlos Indian Reservation. Thereafter, the Bundrick land and the adjacent state land leased by the Bundricks were completely surrounded by Indian land.

The order of January 16, 1969, expressly excluded any patented lands from its operation. As of that time, 6,340 acres of land in the Mineral Strip were patented under homestead laws and 1,740 acres were patented under the mineral land laws. In addition, approximately 200,000 acres of land were subject to grazing leases or permits that had been issued under the provisions of the Taylor Grazing Act.

After the termination, by a court decree dated April 11, 1978, of a lawsuit between the State of Arizona and the United States, the United States reacquired, in trust for the San Carlos Apache Indian Tribe, title to all lands within the Mineral Strip which had previously been held by the State of Arizona, including the 6-1/2 sections of land previously leased by the State to the Bundricks. The lands reacquired by the Federal Government thereupon became part of the San Carlos Indian Reservation.

Since April 11, 1978, the west parcel and the east parcel of the Bundrick land have each been completely

surrounded by tribal land comprising part of the San Carlos Indian Reservation.

As lands within the Mineral Strip were restored to tribal ownership and made part of the San Carlos Indian Reservation under the administrative order of January 16, 1969, and pursuant to the court decree of April 11, 1978, the federal supervisory function with respect to such lands was vested in the Bureau of Indian Affairs of the Department of the Interior.

The Road

At all times material to this case, there has been, and there is now, a road running between the headquarters of the Bundrick ranch, including the Bundrick residence, and an intersection with Arizona Highway 77 about 1 miles south of Winkelman, Arizona. From the highway intersection, the road proceeds about 4 miles to the western boundary of the Mineral Strip, and then runs approximately 10 miles through the Mineral Strip in a general easterly direction to the Bundrick ranch headquarters.

As of 1953, when the Bundrick ranch was established, and for a number of years thereafter, the portion of the road extending eastward from the Mineral Strip boundary first traversed federal land administered by the Department of the Interior under the Taylor Grazing Act, an then crossed land granted to the State of Arizona, before reaching the Bundrick ranch headquarters. Neither the Department of the Interior nor the State of Arizona ever made any objection to the presence of the road, or interfered in any way with the use of the road by the Bundricks.

After the effective date of the order of January 16, 1969, any travel to or from the remaining lands of the Bundrick ranch involved drossing Indian land. Then, after the former state land within the Mineral Strip was made part of the San Carlos Indian Reservation as a result of the court decree of April 11, 1978, the road traversed only Indian land between the western boundary of the Mineral Strip and the Bundrick land.

The road between the Bundrick ranch headquarters and the highway is a dirt country road. It was privately built by the man from whom the Bundricks acquired their lease on state-held grazing land. Pinal County maintained the road until the state land was acquired by the United States, in trust for the San Carlos Apache Indian Tribe, and was made part of the Indian reservation. Beginning in about 1972, plaintiff Edward Bundrick also did some maintenance work on the road, in cooperation with Pinal County.

Plaintiff Yzobel Bundrick was still living on the Bundrick ranch when Pinal County discontinued its maintenance work on the road. Thereafter, until plaintiff Yzobel Bundrick moved from the ranch to Coolidge, Arizona, the road was maintained by plaintiff Edward Bundrick, so that his mother could travel to Winkelman for groceries and other subsistence needs.

After the land, other than patented lands, within the Mineral Strip were made part of the Indian reservation, the Tribal Council of the San Carlos Apache Indian Tribe requested that persons, including the plaintiffs, who regularly crossed tribal land in passing to and from patented land obtain permits authorizing travel

within the reservation. The plaintiffs, however, never applied for or obtained permits, and they continued to travel over the road to and from the Bundrick ranch whenever they wished to do so. Plaintiff Edward Bundrick was stopped by Indian police within the reservation on several occasions. He was asked for identification or why he was on tribal land. He supplied the information requested, and was permitted to continue his journey on each occasion. The evidence in the record indicates that plaintiff Yzobel Bundrick was never stopped or otherwise interfered with by Indian police or other Indian personnel when using the road.

End of Ranching Operation

After the federal land within the Mineral Strip was restored to tribal ownership and made part of the San Carlos Indian Reservation, the Tribal Council of the San Carlos Apache Indian Tribe in 1970 authorized the issuance of grazing permits on such land. Permits were issued on a yearly basis to non-Indian ranchers in the Mineral Strip, including the plaintiffs, in 1970, 1971, and 1972. The plaintiffs' permits covered the same land previously leased from the Department of the Interior.

The permits issued to the plaintiffs and others in 1972 were due to expire at the end of June, 1973. Some months before June 1973, the Tribal Council decided that they would not issue any more permits to non-Indians; and they instructed the personnel administering the grazing resource to notify the permittees of the council's decision. In accordance with this decision of the council, the San Carlos Indian Agency of the Bureau of Indian

Affairs issued a communication to the plaintiffs on February 15, 1973, stating in part as follows:

> Your Grazing Permit *** [will] expire June 30, 1973. Beginning July 1, 1973 a Grazing Permit will not be issued to non-Indians.
>
> As indicated by the attached resolution number 73-8 the San Carlos Apache Tribe will use this area to graze their own livestock.
>
> This notice is being given to you well in advance of the expiration of your grazing permit to provide adequate time for you to make arrangements for the removal of your livestock from the Reservation prior to July 1, 1973. Any livestock not removed by this date will be in trespass and subject to penalties prescribed in the Code of Federal Regulations, Title 25, 151.24.

After the plaintiffs were informed that they could no longer obtain a permit to use any of the tribal land for grazing purposes, they sold their cattle to another person and terminated the ranching operation, which the Bundrick family had conducted since 1953. Without the use of the adjacent 12,800 acres of onetime federal land formerly leased under the Taylor Grazing Act, the plaintiffs did not have sufficient acreage for a viable cattle raising operation.

Plaintiff Yzobel Bundrick, however, continued to reside in the house on the ranch until June 1978. She then moved to Coolidge, Arizona. The move was made for economic reasons, and not because of any difficulty with the Indians of the San Carlos Indian Reservation. Since

June 1978, the plaintiffs have not derived any substantial benefit from the Bundrick land.

It appears that cattle have been observed grazing on the Bundrick land from time to time since the plaintiffs discontinued their ranching operation, but such cattle belonged to some person or persons other than the plaintiffs and the cattle were on the land without the permission of the plaintiffs.

The initial trial of the case was held on the issue of liability only, and did not deal specifically with the issue of damages. The record developed at the trial, however, indicates that the Bundrick land, as part of the ranching operation that also included about 6-1/2 sections of land leased from the State of Arizona and approximately 12,800 acres of federal land leased under the Taylor Grazing Act, had a substantial fair market value; and that the value of the Bundrick land was greatly diminished as a result of the transfer of tribal ownership of the formerly leased lands and the consequent loss of their use as part of the ranching operation.

Remedial Legislation

In December 1974, Congress enacted Public Law 93-530 (88 Stat. 1711). This statute "authorized and directed [the Secretary of the Interior] to acquire through purchase within the so-called San Carlos Mineral Strip as of January 24, 1969, all privately owned real property, taking title thereto in the name of the United States in trust for the San Carlos Apache Indian Tribe," and to purchase from the owners "all range improvements of a permanent nature, placed, under the authority of a permit

from or agreement with the United States, on the lands restored to the San Carlos Apache Indian Tribe for the reasonable value of such improvements, as determined by the Secretary ***."

In accordance with the authorization contained in the legislation, the Secretary of the Interior engaged the services of independent professional appraisers to appraise the value of the patented lands within the Mineral Strip and the value of the improvements made by the owners of patented lands on other lands formerly used by them under lease. The appraisers were instructed by the Secretary of the Interior (or his representatives) to determine the valuations as of January 24, 1969 (the date when the order restoring ceded lands to tribal ownership was published).

After the respective appraisals were completed in 1977 and 1978, representatives of the Secretary of the Interior entered into negotiations with the owners of the patented lands within the Mineral Strip for the purchase of such lands and to reimburse the owners for improvements placed on lands previously used under lease.

The original appraisal report made on the plaintiffs' land and the related improvements in the Mineral Strip by an independent appraiser placed a value of $144,000 on the Bundrick land and a value of $106,434 on the improvements located on the previously leased land, thus making the total appraised value $250,432.

The plaintiffs were dissatisfied with the first appraisal. They contended that the total value of the Bundrick land and the improvements on formerly leased lands was $621,500, rather than $250,432.

On January 19, 1979, an independent appraiser submitted a new valuation for the Bundrick land and related improvements. The value of the improvements on previously leased land was increased by $5,606, but the value of the Bundrick land was not increased from the previous figure of $144,000. Therefore, the new appraisal report fixed a value of $256,038 for the land and the improvements. This figure was not satisfactory to the plaintiffs.

The negotiations between the plaintiffs and representatives of the Secretary of the Interior were ultimately unsuccessful, as the parties were never able to agree on the value of the Bundrick land. Agreement was reached on the value of the improvements on lands previously leased, but government personnel refused to reimburse the plaintiffs for the improvements in the absence of an agreement for the purchase of the Bundrick land.

The appraisals on all patented lands and related improvements within the Mineral Strip were made in the same manner. By 1979, and based on the appraisals, representatives of the Secretary of the Interior were able to conclude successfully negotiations with all owners of patented lands within the Mineral Strip -- except the plaintiffs in this case and in the related case of Alder v. United States, No.37-83L -- for the purchase of all patented lands, and for reimbursement to the landowners for the improvements previously placed on leased lands.

The plaintiffs in this case and in the Alder case, and all former owners of patented lands within the

Mineral Strip, have lived elsewhere in recent years. The plaintiffs in this case and in the Alder case, unlike the other landowners, still retain the titles to their patented lands within the Mineral Strip.

The claim prosecuted by the plaintiffs in this court is not based on Public Law 93-530, but on the basis of an alleged taking by the United States of property, through inverse condemnation, without just compensation. To the extent that the plaintiffs' complaint, as filed in the District Court, sought redress under Public Law 93-530, the complaint was dismissed by the District Court; and that aspect of the case is res adjudicata here.

Discussion -- Improvements

In this court, the plaintiffs' claim is restricted to the contention that they are entitled to just compensation under the Fifth Amendment to the Constitution because of the alleged taking by the United States, through inverse condemnation, of (1) the improvements that were placed on the ceded lands which the plaintiffs formerly leased from the Department of the Interior under the Taylor Grazing Act and from the State of Arizona, and (2) the Bundrick land.

With respect to the improvements aspect of the plaintiffs' claim, the plaintiffs do not contend that the United States breached the respective leases by termimating them improperly, or that the United States took their leasehold interest in the leased lands by unlawfully ousting them from the lands while the leases were still in effect. Thus, the case does not involve the loss of the use of the leased land themselves, but only

the loss of the use of the permanent improvements on the lands previously leased by the plaintiffs.

Just why the plaintiffs believe that they had a property interest, compensable under the Fifth Amendment, in the permanent improvements on the leased lands, when the plaintiffs apparently concede that they did not have a compensable leasehold interest in the lands themselves, is not explained in the plaintiffs' brief.

On the contrary, the plaintiffs correctly state in their brief that "[f]ixtures attached to real property are generally considered a part of the realty."

Accordingly, as the permanent improvements on the leased lands were part of the realty, and as the plaintiffs concede, by implication at least, that the transfer of the lands to the Indian tribe did not violate any constitutionally compensable property right or interest of the plaintiffs in the lands, it necessarily follows that the transfer did not violate any constitutionally compensable property right or interest of the plaintiffs in the permanent improvements on the lands formerly held under lease.

It must be concluded, therefore, that no property right or interest of the plaintiffs, compensable under the Fifth Amendment, in the permanent improvements on leased lands was unlawfully taken by the United States when such lands, through action by the Federal Government, became Indian land.

Of course, the question of whether the plaintiffs have a cause of action against the State of Arizona under Arizona statutory law for the value of the improvements on the land which the plaintiffs once held under lease

from the State of Arizona and which the State disposed of to the United States, in trust for the San Carlos Apache Indian Tribe, is not before this court. Cf. State Land Department v. Painted Desert Park, Inc., 428 P.2d 424 (Ariz. 1967). It is clear that the plaintiffs cannot base a cause of action against the United States on the provisions of an Arizona statute. Insofar as claims against the United States based on legislation are concerned, Congress has authorized courts to adjudicate only those claims that are based upon "any Act of Congress" (28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (1982)). Therefore, a person seeking to assert a claim against the United States under a statutory provision must show that the claim is one cognizable under an "Act of Congress." Cf. Roden Coal Co. v. United States, 95 Ct. Cl. 219, 231 (1941), cert. denied, 317 U.S. 636 (1942).

Moreover, the gravamen of the plaintiffs' claim for the value of improvements on leased lands is stated in the plaintiffs' brief as follows: "[w]hen Plaintiffs lost he right of use to the [leased] land, they lost the right to the use of their improvements." In this connection, the evidence in the record shows that the plaintiffs lost the right to use the former federal land not later than July 1, 1973, the day after the date of the expiration of the plaintiffs' final permit from the San Carlos Apache Indian Tribe covering the use of this land. The Tribal Council refused to issue a new permit to the plaintiffs, after having previously notified the plaintiffs that they must remove their cattle from the land before the expiration of the final permit.

On and after July 1, 1973, therefore, the plaintiffs

did not have any right to use the land which they formerly held under federal lease; and, as the plaintiffs state in their brief, having lost the use of the land, they thereby lost the right to the use of the improvements on the former federal land. Thus, the plaintiffs' claim for the loss of the use of these improvements accrued no later than July 1, 1973. By that date, at the latest, all the events necessary to fix the liability (if any) of the United States had occurred; and the plaintiffs were entitled to institute an action against the United States for the loss of the use of the improvements on the federal land formerly leased under the Taylor Grazing Act; and the pertinent period of limitations began to run. Cf. Japanese War Notes Claimants Association of the Philippines, Inc. v. United States, 178 Ct. Cl. 630, 632-33, 373 F. 2d 356, 358, cert. denied, 389 U.S. 971 (1967), rehearing denied, 390 U.S. 975 (1968).

It was necessary that an action on the plaintiffs' claim be instituted under 28 U.S.C. § 1491 (1970); and 28 U.S.C. § 2501 provided that every such claim "shall be barred unless the petition thereon is filed within six years after such claim first accrues." The filing of an appropriate petition or complaint within the prescribed 6-year period was -- and still is -- a jurisdictional requirement. Soriano v. United States, 352 U.S. 270, 273 (1957); Kirby v. United States, 201 Ct. Cl. 527, 539 (1973), cert. denied, 417 U.S. 919 (1974); Fattore v. United States, 160 Ct.Cl. 666, 670, 312 F. 2d 797, 800 (1963); Parker v. United States, 2 Cl.Ct.399, 402 (1983); Lewis v. United States, 1 Cl. Ct. 158, 160-61 (1983).

This being so, the plaintiffs' original complaint for the alleged taking, which was filed in the United States District Court for the District of Arizona on October 16, 1981, was filed more than 2 years too late with respect to the loss of the use of improvements on land formerly held under federal lease.

Accordingly, the plaintiffs' failure to assert their claim under the Fifth Amendment for the alleged taking of the improvements on the former federal land within the prescribed 6-year period would, in any event, preclude this court from considering the merits of the claim[1].

Discussion -- Bundrick Land

The gist of the plaintiffs' claim with respect to the alleged taking of the Bundrick land by the United States is summarized as follows:

> When the Bundrick ranch was established in 1953, and for a number of years thereafter, the Bundricks had an enforceable legal right to access to the Bundrick land even though it was necessary to cross federal land and state land in order to reach the Bundrick land. Arizona statutory law gave them an enforceable right to acquire access insofar as the state land was concerned; and, in addition, an easement across

[1] Similarly, any action by the plaintiffs against the United States under Public Law 93-530 or an administration regulation for the value of the improvements on federal land was time-barred, when the present action was filed.

the state land was acquired through prescription, inasmuch as the portion of the privately built road which crossed state land was used by the Bundricks for more than 10 years. Also, the Bundricks had an easement of necessity across the federal land, because the Bundrick land could not be reached without crossing federal land.

As a result of the action of the United States in acquiring the state land and making both the federal land and the land acquired from the state part of the Indian reservation, the United States deprived the plaintiffs of their enforceable legal right of access to the Bundrick land. Thereafter, access to the Bundrick land could be had only by obtaining a revocable permit from the Indian tribe to traverse Indian land; and such a permit is not enforceable. The United States, by completely surrounding the Bundrick land with Indian land, has taken the plaintiffs' right of ingress and egress, and has rendered the Bundrick land unmarketable and without value for use as collateral for a bank loan.

Assuming for the purpose of discussion -- but without deciding -- that all of the plaintiffs' contentions previously summarized are correct, the conclusion is inescapable that the taking of the Bundrick land occurred on the effective date of the administrative order of January 16, 1969, which restored all federal land within the Mineral Strip to the San Carlos Apache Indian Tribe

and made such land part of the San Carlos Indian Reservation. After that date, it was necessary for anyone traveling to or from the Bundrick land to cross Indian land. The Bundrick land and the land still held under lease from the State of Arizona were completely surrounded by Indian land. The privately built road running from the western boundary of the Mineral Strip to the Bundrick ranch first traversed Indian land before it reached the state land leased by the Bundricks, and on which the Bundrick ranch headquarters had been established.

Under the plaintiffs' theory of liability for the taking of the Bundrick land, therefore,, the plaintiffs no longer had an enforceable legal right of ingress and egress to and from the Bundrick land after the effective date of the restoration order, and that order subjected the Bundrick land to all of the adverse consequences allegedly flowing from being "landlocked" (the plaintiffs' term) by Indian land.

As any claim which the plaintiffs may have had on the basis of the alleged taking by the United States, through adverse condemnation, of the Bundrick land first accrued on the effective date of the restoration order of January 16, 1969, the plaintiffs were required by 28 U.S.C. § 2501 to institute an action on the claim within the ensuing 6-year period. This was not done, as the plaintiffs' original complaint in the United States District Court for the District of Arizona was not filed until October 16, 1981, or more than 12 years after the claim first accrued.

Therefore, as indicated in court decisions cited

earlier in the opinion, the court is without jurisdiction to consider the merits of the plaintiffs' claim with respect to the alleged taking of the Bundrick land.

## CONCLUSION OF LAW

For the reasons previously stated in the opinion, the court concludes as a matter of law that the plaintiffs are not entitled to recover.

The clerk will dismiss the complaint.

IT IS SO ORDERED.

## APPENDIX "C"

Order and Judgment
Dated November 29, 1982

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

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No. Civ. 81-1320 Phx. WPC

EDWARD BUNDRICK, RUBY BUNDRICK,
AND YZOBEL BUNDRICK,

*Plaintiffs,*

V.

THE UNITED STATES,

*Defendant.*

IT IS ORDERED;

1. This Court's Judgment filed herein on November 15, 1982, is vacated.

2. This case is transferred to the Court of Claims for proceedings relative to the inverse condemnation claim.

IT IS ORDERED, ADJUDGED AND DECREED that all claims encompassed by the complaint other than the inverse condemnation claim are dismissed with prejudice.

WM. P. COPPLE
United States District Judge